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IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 276.

ANDREW WEST, APPELLANT,

vs.

EDWARD RUTLEDGE TIMBER COMPANY AND NORTHERN PACIFIC RAILWAY CO., APPELLEES.

BRIEF FOR APPELLANT.

Statement.

We repeat the issues involved, as stated in our original brief, as follows:

> 1st. The grant having been made to the Northern Pacific *Railroad* Company, a great corporation created by Act of Congress, and to which the Government had theretofore granted approximately forty-three million acres of land, a part of which was to be reconveyed, could a selection be made

by the Northern Pacific *Railway* Company a separate and distinct corporation organized under the laws of Wisconsin, upon the ground that because of its purchase of the property of the *Railroad* Company under foreclosure sale, it was its successor in interest?

2nd. The land having been classified under the Act of February 26, 1895, as mineral, which classification was approved by the Secretary of the Interior March 26, 1901, a date prior to the selection by the company, and the surveyor having failed to make any classification in terms as non-mineral, was the land subject to selection by the company under the Act of March 2, 1899?

3rd. If the Railway Company was authorized to make the selection, and if the land was subject to the selection at the date it was made, was the description given of the land selected, in terms of a future survey, a compliance with the requirement of the statute that it should be described with *a reasonable degree of certainty*, so as to bar the rights of settlers in good faith without actual or constructive notice?

Counsel for appellees in their brief in answer state that although all of these questions were properly before the Circuit Court of Appeals in our Assignment of Errors and were likewise preserved on appeal to this court, the court cannot consider the first two questions for the reason they were not urged in argument below.

It is evident, however, counsel are in grave doubt of the correctness of this contention, for they somewhat elaborately argue these positions, devoting more than 20 pages of their brief to them. They refer to the case of Montana Railway Company vs. Warren, 137 U. S., 348, as supporting their contention.

As to our first proposition, after criticizing our lack of proper investigation, to learn just how, when, where

and by what means the Northern Pacific Railway Company became entitled to select land granted to the Northern Pacific Rail*road* Company, and especially our reference to Smalley's History of the Northern Pacific Railroad Company, and without attempting to controvert statements we made based upon that work, say: "It is not an authentic publication which the court will notice judicially for the purpose of getting information of what took place in the foreclosure proceeding." They do say, however, that the slightest examination of the book itself and of the proceedings through which the Northern Pacific Railway Company got its title, shows our "account of the facts and of the effect of these proceedings to be grossly inaccurate." *But, counsel do not in all the 61 pages of their printed brief venture to make a plain succinct statement of the proceedings by which the Railway Company got its title,* but content themselves with a reference to the case of Northern Pacific Railway Company vs. Boyd, 228 U. S., 482, as an adequate record of the steps by which the Railway Company got its title.

As to the second proposition, viz., that the land was classified as mineral, which classification was approved by the Secretary of the Interior, prior to the date of the selection, they dispute the finding of facts by the Commissioner upon which finding the decision in their favor was based, and which was affirmed by the Department. This finding of facts would be conclusive against the appellant. Does not the same rule apply to the appellees? However, counsel are mistaken. The records in the Mineral Division of the Office show the Commissioner's statement is strictly correct.

As to the last proposition, viz., that there is no such description of the land in the selection as the Act making

the grant clearly requires, they refer to the decisions of the trial court, the Court of Appeals and of the Department, which latter have not been uniform, together with the history of circulars issued by the Department in reference to claims to unsurveyed land, not one of which is applicable by its terms to the Act in question, and not one of which was based upon a similar statute, but all upon statutes requiring a liberal construction, instead of a strict construction as this Act does, and they also take the position that it is a question of fact and, therefore, the court is concluded by such finding. There is no attempt made in any of these decisions nor on the brief of appellees to answer the reasoning of the Department in the Hyde case, 40 L. D., 284, quoted from in our brief. Neither is there any attempt made to controvert our statement as to the erroneous and misleading statements of fact in the Departmental decisions referred to by us wherein it had the opportunity of correcting the errors on motion for rehearing, but failed to do so.

ARGUMENT.

II.

Referring to the contention of appellees that our first and second propositions cannot be considered because they were not urged in argument in the Circuit Court of Appeals and their statement that the decision of this Court in Montana Railway Company vs. Warren, 137 U. S., 348, settled the question, we invite attention to just what was said by the court in that case:

> "Error is alleged in the judgment of the Supreme Court of the Territory; and if in all matters presented to it, its rulings were correct, it

cannot be affirmed that the judgment was erroneous, because there were in the record matters *not vital to the question of jurisdiction or the foundation of right*, but simply a procedure, to which its attention was not called, and in respect to which its judgment was not invoked. All such matters must be considered as waived by the complaining party."

This question was again considered in case of Rosen vs. The United States, 161 U. S., 29, wherein Chief Justice White after stating that the charge was the indictment was absolutely void because it failed to give an identifying reference to that which the grand jury found to be obscene held:

> "If these objections be well founded, they are necessarily apparent on the face of the record. They go to the jurisdiction of the court *ratione materia*. They consequently demanded consideration whether or not they were presented to the court below, or have been regularly assigned for error here. Citing Montana R. Co. vs. Warren, 137 U. S., 348."

The principle involved was considered again in the case of Old Jordan Milling Company vs. Societe Anonyme, 164 U. S., 261. In that case Mr. Justice Brown speaking for the court said:

> "We have repeatedly held that the failure to present and insist upon errors assigned in the court below, constitutes an abandonment or waiver of all the errors so assigned, *not vital to the question of jurisdiction, or the foundation of the right*. Citing the Montana Railway Company case and that of San Pedro, Etc. Co. vs. U. S., 146 U. S., 136."

The latest case in which this question was considered, so far as we have seen, is that of Gila Valley, Globe, Etc. Ry. Co. vs. Hall, 232 U. S., 94, wherein Mr. Justice Pitney speaking for the court said:

> "The impropriety of allowing a party, conceiving himself to have suffered from an erroneous ruling of a trial court in a matter *not jurisdictional, nor essential to the foundation of the action*, but involving a mere matter of procedure, to invoke the judgment of this court thereon, without availing himself of the opportunity for a review thereof in the appropriate appellate court of the territory has been repeatedly pointed out. Citing all of the cases which we have hereinbefore referred to."

While it is true the Circuit Court of Appeals stated the question of the sufficiency of the description of the land was the only question urged in that court, and counsel in their brief insist this was the case, and that therefore no other question can be considered in this court, we beg to call attention to a quotation from page 30 of the printed brief filed by counsel for appellant in that court as follows:

> "We have also assigned as errors, that the court erred in holding and deciding that the Northern Pacific Railway Company had the right to exercise the rights of the Northern Pacific Railroad Company under this grant. We do not desire to argue this matter as a separate and independent assignment of errors, but we think this much will be conceded. That the Northern Pacific Railway Company can exercise no right in the premises except it be by the grace of the courts granted in this case through an exceedingly liberal construction, not only in the language of the grant, and as to the intention of

Congress in passing the Act in question, but as to the records of the Land Department, as well.

Where the equities of the case are so strongly with one of the parties as they are with the appellant in the case at bar, equity requires that the respondent shall be held to the strict letter of the law, and nothing will be permitted to be gained by it by construction. In other words, where a liberal construction would result in depriving one of that which in equity he ought to have, then the rule of liberal construction will be withheld and a rule of strict construction adopted in order that injustice may not be done.

Public policy requires that the rule of strict construction against the Railway Company under the grant contained in this act should prevail. The courts have adopted that rule and it is wholesome."

Moreover, we are informed by one of the counsel for appellant that this subject was presented in the oral argument before the court. It would seem to follow therefore that the court is hardly justified in its statement that the matter of description was the only one presented.

It seems to us the refusal of the court to consider matters not urged in the court below applies only to mere matters of procedure, such as the competency of witnesses, relevance of their testimony, exceptions to instructions and matters of that kind. It will be observed that in each case cited the court distinguished between this class of questions and those which go to the question of jurisdiction or the foundation of the right.

In the case at bar, will it be insisted that if, at the date of the grant to the Northern Pacific Railroad Company, the selections under which grant, is the foundation of the right of appellees, was not in existence, and, therefore, there being no grantee, the grant was void, belongs to

the "mere matter of procedure"? Clearly it goes to the foundation of the right to make the selection. Likewise, if the Railway Company was not qualified to make a selection under the grant to the *Railroad* Company, then there is no valid foundation for its claim.

III.

Again, if our second contention, viz., that at the date of selection the land had been classified as mineral under the Act of 1895, and this classification approved by the Secretary of the Interior prior to the date of the selection, then the land was not subject to selection and no valid title could be acquired thereby is correct, is it a mere matter of procedure? That this goes to the foundation of the right also, seems to us perfectly clear.

IV.

Assuming then that these propositions which go to the root of the right of the Railway Company, and, therefore, may be considered although not presented in argument in the court below, we shall address ourselves to the first of these, viz., that there was no Northern Pacific Rail*road* Company in existence at the date of the Act of March 2, 1899, making the grant to that Company, and, hence there was no grantee in existence and the grant is absolutely void.

In our original brief, we referred to the authorities holding that in such case the grant must fail, and as counsel do not dispute the correctness of this position, we shall assume that we need only to discuss counsel's denial of the facts stated.

Just how the Northern Pacific Rail*road* Company continued to exist after the authorized mortgage and sale

of *the franchise of that company to be a corporation,* neither the decision in the Boyd case nor anything in the answer to the complaint, nor in appellees' brief, informs us.

It is stated that all the lands were not sold under the foreclosure sale in New York in 1875. But, the *franchise to be a corporation was sold and bought by a committee of the bondholders.* Counsel do not question the statement in the opinion of the Attorney General Harmon that after the sale of the franchise to be a corporation "the counsel in charge of the reorganization were certainly justified under the decisions in advising a new act of incorporation, instead of endeavoring to work out a transfer of the corporate existence of the old company to the new one through the foreclosure proceedings."

Under this opinion patents to lands granted to the Railroad Company were issued to this new company—the Northern Pacific Railway Company, as its successor in interest. That the change, which they are pleased to call a "reorganization" took place before the date of the grant of 1899, is not disputed.

The granting Act of 1864 prohibited the mortgage of the property of the company without the consent of Congress. The Joint Resolution of 1870 gave that consent, but *did not provide for any new corporation after the sale of the federal franchise to be a corporation,* which franchise was also authorized to be mortgaged and was mortgaged and sold. What is the legal effect upon the grant of 1899? Counsel in their brief, like the cuttlefish, have succeeded in "muddying the waters," but so far as we are able to discover, have vouchsafed no explanation of this question.

We have nothing to do here with the question whether the conveyance of the land to the United States under

the provisions of the Act, conveyed a valid title. Neither is it important whether the Railway Company is entitled, as the successor of the Rail*road* Company to patents to lands under the grant of 1864, as held by the Attorney General. But it is *vitally* important to know whether there was in existence any Northern Pacific Rail*road* Company on March 2, 1899. If there was not, the grant must fail whatever be the consequences. Counsel are painfully silent on this point although it was pressed in our original brief which they were answering.

Counsel seem to take some satisfaction in criticising our statement that all of the property and the franchises including that to be a corporation, were sold under the foreclosure suit in New York in 1875, and suggest that had we not cared to examine the records of the court in that case, we might at least have examined the case of Montana vs. Boyd, supra, which furnished a sufficient record statement of the facts. While counsel thus find fault with us they set out at page 8 of their brief, the opinion of Judge Dietrich on this point wherein he stated:

> "At the present time the question appears to have been the subject of investigation, and it has been repeatedly held that as a result of foreclosure proceedings consummated prior to the passage of the Act of 1899, the Railway Company acquired *'all the property rights and franchises* of the Rail*road* Company. 21 Ops. Atty. Gen., 486; 25 Ops. Atty. Gen., 401; Ferguson vs. Northern Pacific, 33 L. D., 634. See also Northern Pacific Ry. Co. vs. U. S., 176 Fed., 706; Northern Pacific Ry. Co. vs. Boyd, 228 U. S., 482. It therefore appears that the construction contended for by the plaintiff would render the act nugatory. For if this conclusion is correct, and admittedly it is not open to review upon the record here, it turns out that at the time the Act of 1899 was passed, the Railroad

Company was not possessed of the lands desired by the Government, but that its right thereto had passed to the Railway Company."

We hardly deem it necessary to pursue this subject further since the very authorities which counsel for appellees cite settles the question in favor of our contention.

Counsel are also in error in assuming we did not make diligent and persistent efforts to get at the real facts growing out of the two foreclosure suits and sales and the creation of the Railway Company. We examined every paper in the New York foreclosure action and had copy of the record of the Wisconsin court. In addition to which, for nearly a year we have had those in charge of the records in the Interior Department, including the records of the former Bureau of Railroads search for any papers on files which would show when, where, and in what manner, the Northern Pacific Federal Charter ceased to exist and when, where, and in what manner, the Northern Pacific Railway Company was created and, as alleged, became the successor in interest of the Railroad Company. But so far, all efforts have failed and we have been unable to get any information from the Department. We examined in the New York Public Library the literature of the Railway Company in the hope of finding something definite, but instead we found the present company referred to as the "reorganized Railway Company." And now, after a careful examination of the brief of counsel for appellees and the authorities to which they refer, we are still without light upon these questions.

The Railway Company has been for years receiving patents to lands granted to the Railroad Company as its successor in interest. And yet, where lands are classified as mineral by the Act of 1895, which prohibits the

Railroad Company *or anyone holding under it* from receiving patents to lands thus classified after the approval by the Secretary of the Interior, the Railway Company has been given patents to lands to which the Railroad Company or persons holding under it, could not get patents, upon the ground that the Act of 1899, was a special Act and that the prohibition against the Railroad Company and those holding under it in the Act of 1895, did not apply to the Railway Company's selections under the Act of 1899. If the court can reconcile these positions it is more than we have ever been able to do.

The company has asked, and the Department has granted it, the right to select and obtain patent under the Act of 1899 to lands granted to the Northern Pacific Railroad Company upon the ground that it is its successor in interest and yet the company has insisted and the Department has uniformly declined to hold it was bound by the limitations placed upon the Railroad Company and those holding under it. This, it seems to us, to say the least, is inconsistent.

In the case of Ferguson vs. The Northern Pacific Railway Company, 33rd L. D., 634, Secretary Hitchcock held:

> "With regard to the relinquishment contemplated and authorized by the Act of March 2, 1899, supra, as before stated, it was duly executed and filed as required by the provisions of Section 3 of the Act, and was accepted by the Department as sufficient. Thereupon, the right of lieu selection of an equal quantity of other lands, as provided for in the Act of 1899, *became a part of the general grant made in aid of the construction of the Northern Pacific Railroad* and, as, under the opinion hereinbefore referred to, given by the Attorney General, application for patent.

by the Northern Pacific Railway Company to be acted upon exactly in the same manner as though the applications had been made by the old Northern Pacific Railroad Company. Cited in Jones vs. Northern Pacific Ry. Co., 34 L. D., 105.

It will be noted the Joint Resolution of 1870 was neither a repeal nor an amendment of the Act of 1864, which act prohibited the execution of a mortgage by the company without the consent of Congress. It merely gave that consent. After the execution of mortgages under this permission, the foreclosure and sale of property and franchises including the franchise to be a corporation, in 1875, was not the power to mortgage exhausted? If so, the mortgages executed subsequently by that company and foreclosed in Wisconsin in 1896, were without the consent of Congress. It might have been otherwise, perhaps, if the prohibition in the Act of 1864 had been repealed.

V.

Counsel do not dispute our position that the Act of 1895, by its plain, unambiguous terms required the Commissioners to classify *"all lands,* within certain prescribed limits, within which limits the land in controversy lies. They rely upon a letter of instruction to the Commissioners by the Commissioner of the General Land Office, approved by an Assistant Secretary, confining their classification to odd numbered sections only, and seek to ignore all others. While it may be conceded the Department has power to make rules and regulations to carry out the provisions of the law, it has absolutely no power whatever to make any rule or regulation ignoring or defeating the plain provisions of the statute. Idaho vs. N. P. R. Co., 42 L. D., 118, at bottom of

page 122. That this is undertaken in the instructions of June 25, 1895, upon which counsel relies, is too plain to require argument. But even if such instructions had not been in open violation of the positive terms of the statute, it was impossible for the Commissioners to follow them, for the reason that they could not and did not know, until after survey the locus of odd or even numbered sections and hence *they were not followed*, and the classification made included them, and was approved by the Secretary.

Counsel is also mistaken in the statement that such classification is fatal to our client's case. It is the Railroad Company and those holding under it only, who are prohibited from obtaining title to lands thus classified. The classification would not prevent a settler from attacking it. It is conclusive only against the road and those holding under it.

Counsel at page 15 of their brief quote from the statement of the trial court of West's contention, as follows:

> "Precisely stated it is that the land was not expressly classified as non-mineral by the surveyors in the field; it is not claimed that it was returned as mineral nor is there now any question that it was in fact non-mineral."

If by this statement the court and counsel can be understood to hold that if the land was not returned as mineral, and as it is now known it is non-mineral, is a compliance with the provisions of the law, we must say that we cannot agree with them.

In the case of N. P. Ry. Co., 40 L. D., 64, in construing this Act the Department held:

> "It is true that the land selected by the company may not in fact be mineral but under the

terms of the Act which authorizes the company to select lands in satisfaction of those relinquished by it, it is not believed that the Department can inquire into the question as to whether or not the lands are mineral where they are not classified as non-mineral by the return of the surveyor."

The present contention of counsel is that the statute offered an option and when accepted it constituted a contract. Even if this view is right and instead of being designated a grant it be held to be a legislative option contract, still the acceptance must be precisely as stated in the Act. The offer was to permit the selection in lieu of lands conveyed of a certain class of lands, to be determined, not by the Commissioner, nor by the Secretary, but *by the surveyor* at the time of *actual survey*. It is thus seen the statute fixed the *only kind of land* the Government would permit the company to take, that is, land *classified* as *non-mineral* by the surveyor. It is doing violence to the terms of the statute creating a positive and conclusive limitation, to say that if the surveyor does not return it as mineral, it is "equivalent" to a classification as "non-mineral." To put this proposition in another way, if the surveyor makes *no* classification whatever it is a compliance with the law, a classification as *non-mineral*, and the company is entitled to select it. We may be pardoned for saying that to us, this is most illogical, especially when under all the canons of construction the Act requires a strict construction and the land must be affirmatively shown to be of the exact class, and only class, offered in exchange.

The position assumed that because the surveyor returned the land as suitable for grazing but at present more valuable for its timber, it is an affirmative non-mineral classification, seems to us utterly untenable and

unreasonable. It might be the land department has for the purpose of disposing of the lands under the general laws permitted lands thus described to be entered as agricultural lands, since, under these statutes the character of the land is always open to attack notwithstanding the holding of the office that it is non-mineral. Not so under this Act, but a positive affirmative non-mineral classification by the surveyor is absolutely necessary to bring the land within the purview of the statute. Without such positive classification it is no more the class of land offered in exchange by the Act, than would be land positively known to be mineral. The statute is the measure of the right of the company and must govern whether the terms be hard or lenient.

VI.

Counsel for appellees, while admitting the question of the sufficiency of the description in the selection, was presented to the Circuit Court of Appeals and properly assigned as error on appeal to this court, yet insist it is a question of *fact*, and, therefore, the finding of its sufficiency by the Land Department is conclusive on the courts. They cite a number of authorities to sustain this contention. Evidently the Circuit Court of Appeals did not take this view, for, in concluding its opinion after going into the question fully, that court said:

> "But if this is true as a general rule, nevertheless, for the reasons above stated, the description in the present case in terms of future survey, under the conditions existing, designates the land sought to be selected with a reasonable degree of certainty. That being the single question urged here for our decision, the decree of the District Court is affirmed with costs to the respondents."

Counsel cite the cases of Interstate Commerce Commission vs. Ill. Central R. R., 215 U. S., 452; Interstate Commerce Commission vs. D. L. & W. R. R. Co., 220 U. S., 235; Interstate Commerce Commission vs. U. P. R. R. Co., 222 U. S., 541.

An examination of these decisions show that the Interstate Commerce law specifically makes the finding of facts by the Commission *prima facie* correct. Moreover, in the latest case cited, that of the Commission vs. U. P. R. R. Co., supra, the court stated the issues involved as follows:

> "These appeals raise the single question as to whether in making the 45-cent rate, the Commission acted within or beyond its power * * * the statute makes its finding prima facie correct. Cin. H. & E. R. Co. vs. Interstate Commerce, 206 U. S., 154."

The case of Burffening vs. Chicago, Etc., Ry. Co., 163 U. S., 221, quoted from by counsel was a question of the invalidity of a land patent. Counsel quote what the court said as to the class of questions which the courts hold are made conclusive by the finding of the Land Department, but they fail to quote what followed it in the opinion, viz.:

> "But it is also equally true that when by Act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent transfer no title and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof."

The court cites a number of cases including that of Morton vs. Neb., 88 U. S., 21, where the question was whether lands were saline in character.

In the well considered case of Wiggins vs. Burkham, (77 U. S., 10 Wall., 129), this court held:

> "The proposition that what is reasonable time in such case is a question for the jury, as laid down by the court below, cannot be sustained. Where the facts are clear, it is always a question exclusively for the courts. The point was so ruled by this court in Toland vs. Sprague, 12 Pet. 336. See also Lockwood vs. Thorne, 11 N. Y., 175 and 2 Pars. Cont. Note c 661. Where the proofs are conflicting the question is a mixed one of law and of fact."

In the case of Standard Oil Company vs. Van Etten, 107 U. S., 325, the court held:

> "It is next objected by the plaintiff in error, that the court below erred in its rulings upon the account offered and admitted in evidence and which, it was claimed was a stated account. The claim on this part of the case is, that an account rendered becomes an account stated, unless objected to within a reasonable time; that what constitutes a reasonable time in such a case is a question of law; and that an account stated cannot be impeached except for fraud or mistake, and in support of these propositions, counsel cite Perkins vs. Hart, 11 Wheat., 237; Toland vs. Sprague, 12 Pet., 334; Wiggins vs. Burkham, 77 U. S., 884; Lockwood vs. Thorne, 11 N. Y., 170, and other cases.
>
> There is no dispute but that this is a correct statement of the law and it is precisely what is charged by the Circuit Court."

The courts have universally held that where the facts are all admitted or undisputed, that what is "reasonable" within the meaning of any given statute, is a question of law for the courts. Chilton vs. St. L. & Iron Mt. R. Co., 19 L. R. A., 269; 9 Cyc., 591; Dennis vs. National Bank, 38 Wash., 439; 80 Pac., 764; Fleischner vs. Kubli, 25 Pac., 1089; Bonnett vs. Vallier, 116 N. Y., 885; State vs. Redmond, 114 N. W., 137.

Where there is a mixed question of law and fact, and the court cannot so separate it, as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive. But if it can be made entirely plain to a court of equity that, on facts about which there is no dispute or reasonable doubt, the officers of the Land Department have, by a mistake of law, deprived a man of his right, it will give relief. Marquez vs. Frisbie, 101 U. S., 473; Whitcomb vs. White, 214 U. S., 17.

In the case at bar, there is no dispute as to the facts and has never been any. It follows that even if the court should hold it is a mixed question of law and fact, there can be no difficulty in separating them and determining whether there has been a mistake of law made upon the admitted facts.

VII.

As hereinbefore stated, counsel rely upon the circulars issued under the Act of 1897, known as the "Forest Lieu Act," and the Act of 1898, for the adjustment of the company's grant, as construed and applied by the Department the trial court, and the Court of Appeals in this case in support of the sufficiency of the description in terms of a future survey, characterized by First As-

sistant Secretary Jones as an "expected or hypothetical description," 42 L. D., 259.

If we start right in pursuing this subject, we shall have but little trouble in arriving at a correct conclusion. There are only two *possible* descriptions of public lands. One a description *in fact*, which is a marking on the ground or a reference to monuments or natural land marks; the other is a *description in law*. The latter is only possible after the approval of the survey of the land by the Commissioner. Prior to that time, there is no official survey and consequently no official description or designation is possible. U. S. vs. Morrison, 240 U. S., 192.

The selection by the company in this case is neither a description in fact nor one in law. In point of fact it does not purport to be a *description* of land. It is only a designation of a certain number which some unknown quantity of land may bear after the official survey which is based upon a marking on the ground. Neither is anyone, except, possibly, counsel for appellees, bold enough to assert that in itself it is a sufficient description for any purpose whatever. The Circuit Court of Appeals while sustaining the description did it in defiance of what it laid down in the decision as the correct rule. At page 110 of the record, after giving the Century Dictionary definition of the word "designate" used in the Act, it is said:

> "A description by legal sub-division is a perfectly intelligible designation of a tract of land; so it must follow that a description which will be a legal sub-division when surveyed, if lying ***adjoining*** a sub-division, already surveyed, is also a perfectly intelligible description."

And yet the court applied the description to a tract three miles distant from any surveyed line over a mountainous, heavily timbered country, which line, as we have shown, had nothing whatever to do with the location of this land.

Again, in the same decision at page 109, the court said:

> "It may be conceded, in so far as it respects this case, that a description of a section or a quarter section by legal sub-divisions in the fastnesses of the Cascades or Rocky Mountain Ranges, far distant from any Government survey, *or even generally,* that a description in terms of future survey, is not such a description as is contemplated by the statute."

The trial court held that such a description was sufficient when the land was located in the "immediate vicinity" of an established line of survey.

It follows that although sustaining the description both courts held it was not sufficient in itself, and the Circuit Court of Appeals held it was not generally such a description as contemplated by the statute, but was intelligible if lying "adjoining" an established line of survey.

Counsel, quoting the decisions of the trial court and the Circuit Court of Appeals and certain decisions of the Department, seek to apply the provisions of the circular under the Act of June 4, 1897, to the selection in this case.

It is conceded that prior to November 3, 1909 (38 L. D., 287), no *general* instructions as to the selection of unsurveyed lands was ever issued, but prior to that time special instructions were issued in the administration of

numerous acts, such as the Valentine Scrip Act, Sioux Half Breed, and perhaps some others, but no general circular, and none was issued under the Act of March 2, 1899.

In the thoroughly considered case of the State of Idaho vs. Northern Pacific Ry. Co., 37 L. D., 135, involving the claim of the State under the Act of 1894, the Railway Company, under the Act involved in this case and certain settlers, the Department in a very elaborate decision, among other things, stated:

> "The State seeks to apply the same rule to selections made under the Act in question that is applied to selections made under the Act of June 4, 1897, and June 6, 1900. The instructions issued under said Acts were not intended to govern selections made under other acts. Comstolk vs. Northern Pacific Ry. Co., 34 L. D., 88."

In the same case, referring to the Act of July 1, 1898, the Department held:

> "The State to sustain its position that the construction of the Act of March 2, 1899, supra, is controlled by the construction placed by the Department upon the Act of July 1, 1898, takes the ground that the two statutes have a common purpose, and the language used in Departmental instructions of February 14, 1899, (28 L. D., 103), and decision rendered in the case of Northern Pacific Railway Company vs. Frei (34 L. D., 661), is quoted and relied upon. *The circular referred to was issued prior to the passage of the Act of March 2, 1899, and it is clear the directions therein contained can have no reference thereto.*"

In the Comstolk case cited, construing the Act of June 6, 1900, confining lands selected under the Act of June 4, 1897, to surveyed lands, the Department held:

"It will be noted that by the terms of said Act (June 6, 1900), it applies only to selections made under the provisions of the Act of June 4, 1897, and not to those made under the Act of March 2, 1899, in question. * * * Said Railway Company therefore was not confined in making selections after October 1, 1900, under the Act of March 2, 1899, to surveyed lands."

The Department thus clearly distinguishes between the Acts of 1897 and that of 1898, and the Act of March 2, 1899, and declined to apply the very same circulars which it afterwards applied and which the Circuit Court of Appeals applied to the Act of March 2, 1899. In order to protect the company against the confining of selections under the Act of 1897, to surveyed lands, as well as the repeal of that statute in 1900, it was held neither of these acts nor the circulars issued under them applied to the company so as to prevent its selection of unsurveyed lands. But, when it came to a question between the Railway Company and settlers, both the Department and the court applied these circulars to the selection which it is admitted was not sufficient in itself but must be bolstered up by these circulars applicable to other acts and which, the Department declined to apply to it when it affected the interests of the company.

While the Department, the court and counsel for appellees, all insist that the circulars under the Acts of 1897 and 1898, particularly that under the Act of 1897, is broad enough to cover all selections, the fact remains that the Department, on November 3, 1909, (38 L. D., 287), issued a circular applying to all applications and selections for and filings and locations upon unsurveyed lands. If this circular under the Act of 1897 was broad enough to cover all such cases, why issue a general circular for that purpose? We have seen the Department

had in at least two cases held it was not broad enough to apply to the statute involved in this case. It will also be noted this general circular requires a very specific description of the land by metes and bounds, with courses, distances, and reference to monuments by which the location of the tract on the ground can be readily and accurately ascertained. It also requires posting on the land and an approximate description of the land by sections, town and range. Moreover, it is *specifically made retroactive on its face.*

An examination of the record in the Land Department will show that counsel in this case urged in the Department that the regulations relating to selections under the Act of June 4, 1897, have no application whatsoever to selections under the Act of July 1, 1898, or March 2, 1899.

If this view is right and this circular is not applicable, and it is conceded the land is not adjoining or nearer than three miles of any surveyed line, and it being conceded also the description is not sufficient in itself, we hardly see upon what ground it can be defended.

It seems to us the Interior Department has not been quite fair to the settlers in these cases where their homestead claims are in conflict with the selections by this company. This is true both as to its decisions and its erroneous statements, or failure to make statement, of clearly established facts.

In the Hanson case (38 L. D., 491), which included the West case and ten others whose joint petition was considered in that decision and all ruled by it, the Department said:

> "Only one pertinent question raised by the motion is left for present consideration. This is the

question of the alleged insufficiency of description. The only description given by the Railway Company of lands selected herein was of 'lands which when surveyed will be described as follows', etc. There were no monuments upon the ground and no location of the land by reference to natural monuments, and nothing to give notice to settlers that the land had been appropriated by selection under the Act of March 2, 1899. At the time this motion was entertained this Department had grave doubts as to the sufficiency of such description as against the claim of a settler subsequently initiated, and there was under contemplation then the formulation of regulations which would give more precision to such selections and afford settlers greater security in the matter of initiation of claims for such land. Since that time that subject has been carefully considered by the Department and regulations have been issued which will give such precision and afford such security. (Circular of Nov. 3, 1909, 38 L. D., 287.) It appeared, however, that the practice of allowing selections by the Railway Company as those selections were made had been of such long standing and such uniform practice that it would be unfair, if not illegal, to give retroactive effect to such regulations."

The unfairness in this statement is that, in point of fact, there was no such practice either uniform or of long or short standing. If there had been, the Department would have been quick to point to this or that decision of the Department so holding; or that the question was presented to the Commissioner in such and such cases and this description was held to be sufficient and subsequently followed in other cases. Or that this or that circular under other Acts had been applied. But no, not a reference is made, but simply the bald statement: "*It appeared*, however, that the practice, etc." Of course

it would have been entirely practicable to refer to any such decision if there had been any. But there were no such decisions and in point of fact this Hanson case was the first case in which this question was presented and there were no precedents whatever. The Department was in grave doubt and sustained a motion for rehearing and we believe oral argument was submitted before this most unusual conclusion was arrived at.

In fact the only circular in existence at that time involving the land in this case was the circular under the Act of 1895 for the classification of this identical land (20 L. D., 350), which directed the Commissioner in the classification of unsurveyed lands to—"observe the difference that the land must necessarily be described by natural objects and permanent monuments to identify the same."

The instructions issued by First Assistant Secretary Pierce July 26, 1910, (39 L. D., 116), for carrying into effect the extension of the Act of 1895, dated June 25, 1910, repeated this instruction as to unsurveyed land to be classified by the Board.

Again when the Daniels' case, cited by the court below and by counsel for appellees was argued orally, we challenged counsel and asked the First Assistant Secretary and his assistants, together with the Commissioner of the Land Office, to point to any decision recognizing such practice. They failed to do so and in the decision none was pointed out. We still insist there never was any such practice until the decision in this case under the title of the Hanson case.

That there was no such practice, and no *precedent* even tending to sustain this position taken by the Department and followed by the courts we beg to refer to

the quotation from the letter of First Assistant Secretary Adams found at page 49 of our original brief as follows:

> "In conclusion I have to say that in the study of the various Acts of Congress, above mentioned, I was profoundly impressed with the thought that while they permitted and authorized the initiation of claims to unsurveyed lands, they all evidently contemplated that such lands should be identified in some appropriate and effective way. There is nothing in any of these acts justifying another conclusion. If, in the administration of these laws, *it has been assumed that identification* would be accomplished by such description as is now contended for *on the ground of precedent, such assumption was unwarranted.*"

Here is a plain unmistakable statement by the Department that any assumption that in the administration of any of the laws authorizing the initiation of claims to unsurveyed lands, could be identified by a description in terms of future survey, on the ground of *"precedent,* was *unwarranted."* This is a clear statement of fact which never has been, and cannot be successfully refuted and is decisive of the question against the contention of appellees. Their quarrel must be with Secretary Adams as well as with us.

Moreover, although, as set out, a circular was issued November 3, 1909, which it is admitted did "afford settlers greater security in the matter of initiation of claims for such land," which, by its terms is made retroactive, the Department held "it would be unfair if not illegal to give retroactive effect to such regulations." The direction given by the circular is as follows:

> "You will hereafter reject any such application selection, filing or location, under whatsoever

law permitted, unless it conforms to the following rules."

Then follows drastic rules for both a metes and bounds and an *approximate* section, town and range description, together with posting upon the land.

Why unfair to make this regulation retroactive against the company? It is admitted no instructions had ever been issued under the Act by which it might have been misled. Neither is there any pretense that the Company has any equities whatever, nor had it at the time any vested right, nor is there any claim that it would be injured if the selection was held to have been insufficient, for the reason that it has never expended a dollar on the land and its scrip could be withdrawn and is more valuable to-day than when it was located. The equities are all on the other side in favor of the settler, but no consideration whatever seems to have been given his rights. See the doctrine enunciated by this court in the case of N. P. Ry. Co. vs. Amacker, 175 U. S., 564.

Why illegal to apply it in a case where the Department was making the first decision governing selections under the Act? It cannot be said that the Department has no power to make such requirement retroactive, particularly where no other instructions had been issued which could possibly make it unfair or unjust to do so, and the instructions are made retroactive on their face. It was not considered either unfair or illegal by Secretary Lamar to issue a drastic circular August 4, 1885, (4 L. D. 90) requiring all railroad companies to specify losses in their indemnity selections tract for tract, instead of in bulk as had been a uniform and long established practice. The Commissioner was directed to be careful to see that the rule was strictly complied with, and was directed to reject all selections not made in conformity thereto.

In the case of La Bar vs. Northern Pacific R. R. Co., 17 L. D., 406, Secretary Smith held:

> "The requirements of the order of August 4, 1885, must be enforced, and the companies required to specify a base not only for pending selections, but *for all selections heretofore approved* on account of which no previous loss has been assigned."

In that case it was held the company abandoned its selection list of 1883 by filing the list of October 12, 1887, and the previous decision denying La Bar's right was recalled and vacated and he was permitted to make entry of the land. It was held by Secretary Smith that this order not only applied to all selections made but to cases where selections had been approved and the companies were required to submit new assignments tract for tract.

VIII.

In this case counsel for appellees devote much space to this question, insisting that the company complied with the practice established by the Department and that in a question of "*practice and procedure* merely," it cannot be deprived of its rights upon the ground that the construction of the statute was ill-advised and that a different mode of procedure should have been prescribed. They contend, to hold otherwise would be to penalize it for its obedience to the rules laid down by the officers to whom the administration of the law is confined.

There might be some force in this position, but for the fact there was *no* "practice and procedure" under this statute. If counsel could show that a circular of instructions had been issued under the statute, which had been

complied with, they might have some reason to complain, but it is admitted there was not at the date of the selection, nor at any time thereafter, any such circular. Neither could any departmental decision under the Act be pointed to as establishing a practice, especially in a case where the matter was contested. But even in such case, this court, in the case of Hewitt vs. Schultz, 180 U. S., 156, Mr. Justice Harlan speaking for the court said:

> "It is a settled doctrine of this court that the practice of a department in the execution of a statute is material only where doubt exists as to its true construction."

In Fairbank vs. U. S., 181 U. S., 283, Mr. Justice Brewer speaking of such construction said:

> "Where there was obviously a matter of doubt, we have yielded assent to the construction placed by those having actual charge of the execution of the statute, but where there was *no doubt* we have steadily declined to recognize any force in practical construction. Thus before any appeal can be made to practical construction, it must appear that the true meaning is doubtful."

In Houghton vs. Payne, 184 U. S., 66, this court speaking through Mr. Justice Brewer said:

> "It is well settled that it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction. It is a rule of interpretation, but not an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction."

In Freemont vs. U. S., 17 How. 557, Chief Justice Taney, speaking of such construction said:

> "It has always been held that it is for the court to decide what weight is to be given to information obtained from any of these sources."

The cases of Germania Iron Company vs. James, 89 Fed., 811, and the same case on second appeal, 107 Fed., 597, upon which counsel rely and from which they quote extensively, involved one of the established "Rules of Practice," of the Department. This is very different from an unidentified, supposed practice not based upon any rule, regulation, circular or even contested decision.

But what counsel term "the great leading case on the subject" is that of U. S. vs. MacDaniel, 7 Pet., 1. Counsel say that in that case "there was no specific rule, regulations, or decision sanctioning such payments, the matter was merely one of customary usage and practice in the Department."

The court, after stating that the duties performed by the defendant were necessary for the public service, that the payments by him were legal, and being made under the immediate direction of the Secretary of the Navy, errors were avoided which might have occurred under other circumstances, said:

> "It must be admitted that there was no law authorizing the appointment of the defendant, nor was it considered necessary that there should be a special statutory provision on the subject. For the convenience of the officers of the Navy and others who were engaged in the service of the Department, certain disbursements became necessary; and as no law specially authorized the appointment of an agent for this purpose, they were required to be made by a clerk."

Further on, the court said:

> "If some legal provisions be necessary to sanction the payment of the compensation charged, application should be made to Congress by the head of the Department, who required the service and promised the compensation. But no such provision is necessary. For more than 15 years the claim has been paid for similar services, and it is now too late to withhold it for services actually rendered. It would be a novel principle to refuse payment to the subordinates of a Department because their chief under whose direction they had faithfully served the public, had mistaken his own power, and had given an erroneous construction of the law. But the case under consideration is stronger than this. It is not a case where payment for services is demanded, but where the Government seeks to recover money from the defendant to which he is equitably entitled for services rendered. This court cannot see any right either legal or equitable, in the Government, to the sum of money for the recovery of which this action was brought."

It will be observed also that the court held that the construction of the law by the Secretary of the Navy was correct. It seems to us, therefore, that this decision is not in point in this case.

Counsel quote from the decision of this court in U. S vs. Alabama, etc., R. Co., 142 U. S., 615, the language of Mr. Justice Brown, citing and approving the MacDaniel case. Counsel, however, omitted the most important paragraph in that decision, which is as follows:

> "We think the contemporaneous construction thus given by the Executive Department of the Government, and continued for nine years through six different administrations of that

Department; a construction which, though inconsistent with the literalism of the Act, *certainly consorts with the equities of the case,* should be considered in this suit."

In that case also the court held the words of the statute were susceptible of three constructions. We hardly think it will be held the Act of 1899 is susceptible of three constructions, nor can it be made to appear that the equities are with the Railway Company. Moreover, there has been no uniform construction of this Act through six different administrations. In the Hanson case, which is the case at bar, supra, dated March 16, 1910, the Department stated that when the motion for review in that case was entertained (June 9, 1909), the Department had grave doubts as to the sufficiency of the description as against the claim of a settler subsequently initiated, and that on November 3, 1909, a general circular had been issued requiring a more definite description, but declined to consider it was retroactive.

Again, in the case of F. A. Hyde, et al, decided October 6, 1911, (40 L. D., 284), under Secretary Fisher's administration, after a very thorough consideration of the question of such a description under the Act of June 4, 1897, which did not require the strict description required by the Act of 1899, it was held it was insufficient and that the land could not be *sufficiently identified* for anyone to make an affidavit that it was "unoccupied" as required by the statute. It follows that there has not been a uniform construction of the statute. The decision of the Hyde case remained the settled doctrine of the Department from October 6, 1911, until changed August 3, 1914, in the Daniels' case, 43 L. D., 381, and as there has been no change in the administration since that time, it is perhaps acted upon at this time.

IX.

The Act of March 2, 1899, authorized the selection by the Northern Pacific Railroad Company in lieu of certain lands belonging to it to be conveyed to the United States, the selection of

> "An equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual Government survey, which has been or shall be made of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of making such selection."

Section 4 provides:

> "In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe the same with a reasonable degree of certainty; and within the period of three months after the lands including such tract shall have been surveyed and the plats thereof filed by said local land office, a new list shall be filed by said company, describing such tract according to such survey; and in case such tract, as originally selected and described in the list filed in the local land office, shall not precisely conform to the lines of the official survey, the said company shall be permitted to describe such tracts anew, so as to secure such conformity."

In the case of Platt vs. Union Pac. R. Co., 99 U. S., 558, this court said:

> "Congress is not to be presumed to have used words for no purpose.
>
> The admitted rules of construction declare that a legislature is presumed to have used no superfluous words."

In the case of U. S. vs. Landram, 118 U. S., 85, this court said:

> "Every clause in a statute should have effect, and one portion should not be placed in antagonism to another."

These would be proper rules of construction in any case and certainly their strictness should not be ignored or modified in favor of a grant to a private corporation by the Government of the property it holds in trust. No departmental decision nor that of the trial court nor of the Circuit Court of Appeals has ever held the description of a tract of unsurveyed land in terms of a future survey, is, in itself, a compliance with the plain unambiguous requirements of this statute. The extreme in that direction to which any decision has gone, is that in a few instances it is possible the certainty required might be attained through extraneous surroundings.

Even counsel for appellees do not insist it is sufficient in itself but they rely upon these decisions of the Department, of the trial court and the Circuit Court of Appeals, together with the circulars of instructions cited and construed therein, which were issued under the Act of 1898, dated February 14, 1899, (28 L. D., 103), and that under the Act of June 4, 1897, dated May 9, 1899, (28 L. D., 521), none of which considered such description as applicable in all cases, and confined its applicability to cases in the "immediate vicinity," or in the "*vicinity*" of established lines of survey. Moreover the circular of May 9, 1899, was specifically revoked by the circular of December 18, 1899 (29 L. D., 391). Under the same act, which latter circular *was in force* at the *date of selection* and required *posting* on the land and in the local office and by publication, neither of which was done in this case.

Congress did not use words for no purpose. What then was its purpose in requiring the company in selecting unsurveyed lands, which they were in no sense bound to select, but selected only as a matter of choice, to designate them with *"a reasonable degree of certainty,"* most unusual descriptive words in a granting act? And what was its purpose in providing for filing a new list after survey, and also in permitting it to make the description conform to the survey? Was it for the benefit of the company only? Certainly not, for, unless it was to protect it against the initiation of other claims, the requirement of the new list would be absurd and of no possible use to the company, for the selection could have been just as well made after the survey. To hold otherwise is to make Congress use words to no purpose.

No, it was clearly to require such a description as would in some manner mark the land on the ground or describe it by natural objects or metes and bounds in order that intending settlers or claimants under other Acts would have notice of its location without in all cases having to employ a surveyor who at most would be able only to approximate the location of the selection and could in no case be certain of it. Again, as to the privilege of conforming the description to the survey in the new list required, and which the Department has held must be filed within the time limited to protect it from the acquisition of other and superior claims, what is its purpose? Did Congress use words to no purpose in requiring this new list conforming the description to the survey? Undoubtedly it did, if the description in terms of a future survey is sufficient, for *there can be no conformation, has never been in any case and never can be,* for the simple reason there *is no description whatever to conform.* The only description is that which the sur-

veyor may give when he makes the survey, and that is certainly the end of it so far as conformation is concerned. This alone is conclusive evidence of the fact that Congress intended a description in fact, which in many cases would require conformation.

The homestead settler on unsurveyed land must mark his claim on the ground, and when the land is surveyed he must adjust his claim to the lines of the survey. Likewise the mineral claimant must also mark his claim on the ground and post it. And since November 3, 1909, it must be done in all cases. All of this is to give notice to others of the exact location of their claims. Why should a different rule prevail under this Act which requires reasonable certainty of the location? The circulars relied upon are based upon other statutes containing different language and all entitled to a liberal construction, because in the interest of settlers. None of these statutes require the same particularity of description that is required in the one at bar. Counsel did not always consider the circular under the Act of June 4, 1897, as applicable to the Act of March 3, 1899. The latter is a special act and when the provision of the Act of June 4, 1897, permitting the selection of unsurveyed land was amended so as to confine it to surveyed lands, it was claimed by the company and held by the Department this amendment did not affect the rights of the company for that reason. (34 L. D., 88.) It was likewise so held when the Forest Lieu Act was repealed and the company was held to be unaffected by the repeal, and yet the Department, the Trial Court, the Circuit Court of Appeals and counsel hold and contend that the circular under the Act, as to sufficiency of description *is applicable* to protect its selection, though not so upon its face, and issued under a general statute while the one at bar is special.

But, even if applicable, the circular does not recognize descriptions of land in terms of future survey as sufficient, except in special cases, as stated therein, "if practicable." This probably means when tied to an established survey, and in all other cases a description in fact is required by this circular. Why the Department or the courts should sustain such a description the effect of which would be the defeat and denial of the rights of actual settlers without notice or knowledge of the claims of the company, which has no equities, by applying this circular under a general statute, we cannot understand.

X.

The learned Circuit Court of Appeals in attempting to show in this case how the land could have been readily located over a mountainous timbered country by measurements from the corner of Section 32 on the south line of the township immediately north, which had been surveyed, demonstrated conclusively that it could not be done with an approach to accuracy, for, if measurements had been made from this corner, it would have been nearly 17 rods from where the line of Section 20 closed on said south line of the township north. See diagram and copy of Twp. plat filed with our original brief.

We assert that no surveyor who ever lived could have, in advance of the issuing of instructions for the survey of the township, located with any degree of accuracy, any tract in it. We argued this question somewhat fully in our original brief and desire now only to invite attention to some decisions of the courts which are not referred to therein.

On the point of the impossibility of identifying land before surveys, the Supreme Court of Idaho, in the case of Rogers vs. Hawley (115 Pac., 687), in giving the

reasons for exchanging the 16th and 36th Section in a forest reserve for surveyed lands outside stated:

> "Under the rule adopted by the Supreme Court of the United States in U. S. vs. Montana Lumber and Mfg. Co., 196 U. S., 573, and followed by this court and other courts. Azcuenaga Bros. Live Stock & Land Company vs. Cortt (115 Pac., 18); Clemmons vs. Gillette, 33 Mon., 321; 83 Pac., 879, and U. S. vs. Burdeye, 137 Fed., 70; C. C. A., 100, there is no method whereby the State can identify an unsurveyed section of the public domain, and no evidence would be admissible to identify a school section until after the Government survey has been made. In the absence of any means of locating the section on the ground and identifying it, the State cannot lease the land to anyone and can consequently, realize no profit or income from any unsurveyed section."

The case of the U. S. vs. Montana Lumber Co., 196 U. S., 573, referred to by the Supreme Court of Idaho, supra, was an action in trespass against the Railway Company for cutting timber on the land prior to survey. The company claimed that by a private survey made by it, the land in question was shown to be an odd-numbered section which belonged to the company under its grant, and therefore it could not be liable for trespass in cutting timber on the land granted to it. This court Mr. Justice McKenna, speaking for the court said:

> "The survey of the land is left to the Government; in other words, the identification of the sections—whether odd or even, is reserved to the Government."

Again, he quoted approvingly from the decision in the case of Leavenworth L. & G. R. Co., 92 U. S., 733, as follows:

> "They (the words 'there be and is hereby granted') vests a present title, though a survey of the lands and location of the road are necessary to give precision to it, and attach it to any particular tract * * * until the identification of the even and odd-numbered sections the United States retained a special interest in the property at least, etc. * * * It was error, therefore, in the trial court to admit the survey made by Ashley."

As also bearing upon this point this court in the case of U. S. vs. Morrison (240 U. S., 192), involving the question whether prior to survey, Congress could make other disposition of the 16th and 36th sections theretofore granted to the State of Oregon, Mr. Justice Hughes speaking for the court among other things, said:

> "Prior to survey, the designated sections were undefined and the lands were unidentified."

After stating that the people were not interested in getting the identical 16th and 36th sections it was said:

> "Indeed, *it could not be known* until after a survey where they would fall."

Again—

> "Until the status of the lands was fixed by a survey, and *they were capable of identification*, Congress reserved absolute power over them * * * the State was to be compensated by other lands equal in quantity, and as near as may be in quality. By this means the State was fully indemnified, the settlers ran no risk of losing the labor of years and Congress was left free to legislate touching the national domain in any way it saw fit to promote the public interests."

As to when a survey is complete it was said:

> "It necessarily follows that the making of a survey and its approval by the Surveyor General of Oregon, did not make the survey complete as an official act. It still remained subject to the examination and approval of the Commissioner. * * * If title passes upon survey, it must be upon the survey duly completed according to the authorized regulations of the Department."

If, therefore, the State of Idaho, as held by her Supreme Court, and the State of Oregon as held by this court, with all their great power and resources, were unable to identify the 16th and 36th sections granted to them, how we may ask, is what the district court held to be the "land-hungry" homestead claimant, without means, perhaps, living in a tent and carrying his supplies sixty to seventy-five miles on his back, as was the case with most of the settlers in this vicinity, to identify the tract, the company has selected without furnishing him a more definite means of identification than Congress furnished these States in their grant?

These decisions also completely overthrow the doctrine that a tract might be identified if in the vicinity of a surveyed line, for section 36 is always the southeast corner of a township, which corner is the one from which, under the manual of surveying the survey is always commenced in the absence of special instructions to the contrary.

Instead of such a description being "reasonably certain" as required by the law, it is *most unreasonably uncertain.*

At page 44 of their brief counsel for appellees call attention to the fact that we attributed to this court certain language set out in the case of Central Pacific Rail-

road Company vs. Nevada, 162 U. S., 512, as language used by Mr. Justice Brown speaking for the court, when in fact it was the language of the Supreme Court of Nevada, quoted approvingly, as we understand it.

Admitting we accidentally attributed the language to this court, yet, the language actually used by Mr. Justice Brown is not only substantially the same, but is more pointed and more succinctly stated than that by the Supreme Court of Nevada. It is as follows:

> "While as above stated, it does not clearly appear from the opinion of the Supreme Court of Nevada in this particular case, what the distinction is as to a possessory claim between surveyed and unsurveyed lands, there is a clear distinction in the fact that, *until lands are surveyed, it is impracticable to identify them for the purposes of taxation.*"

If counsel can get any comfort out of this accidental error, they are certainly entitled to it.

Counsel, at page 38 of their brief, referring to our contention as to what would be a sufficient description under the terms of the Act, say:

> "The form of description which appellants argue for in these cases calls for *absolute certainty*. But the words of the Act are more elastic in their meaning and purpose."

On the contrary, we insist only upon such description as has been absolutely required of the company under this Act since November 3, 1909, and which the Department in the Daniels' case said should "always have been as it now is, required," and such only as the homestead settlers and the mineral claimant always have been required to give and which would constitute notice to other

intending claimants. Moreover, an "absolutely certain" description would not be such as is contemplated by the Act, for, in such case, there never could be any occasion for the conformation required by the law. It is just here the construction of counsel and the decisions favorable thereto, demonstrate their error. A mere statement of their construction, when compared with the terms of the Act, demonstrates the inherent vice of the proposition. The description in terms of a future survey is either "absolutely certain," or it is no description at all, and is absolutely void for any purpose. No one claims it is absolutely certain, and if it were so claimed, it would make vain and foolish both the requirement of a new list and the provision for conformation after survey. It is squarely in the face of the Act.

Necessarily, therefore, it is conceded by all of the advocates of its sufficiency it is not absolutely certain; in fact, it is not certain at all, but it is erroneously claimed it is capable of being made certain and defended for that reason. But if this were true, (and the decision appealed from demonstrates its fallacy), whose *duty* is it to make it certain. The company, or any and all persons desiring to initiate claims? Can a description be a compliance with the law requiring designation of land with a reasonable degree of certainty, which is admittedly uncertain, and the selector does not attempt to make it so, but leaves that to anyone who dares attempt to acquire title, the right to which is given him under the Act of 1880, to any tract in an unsurveyed township for fear of trespassing upon this admittedly uncertain description and losing his improvements and his time and labor after the survey of the land? It seems to us utterly unreasonable and untenable and therefore should not be sustained by the court.

In reference to the insistence by counsel that instructions applicable to the Act of July 1, 1898, and June 4, 1897, are broad enough to cover the description required in the Act of 1899, let us compare them and see to what extent, if any, the description required is the same, even though they were entitled to the same liberal construction as the Acts of 1897 and 1898 are.

The Act of July 1, 1898 (30 Stat. 620) provides in terms that "all selections of unsurveyed land shall be of odd-numbered sections to be identified by the survey when made."

The Act of June 4, 1897 (30 Stat., 36) provides that in cases where tracts are covered by an unperfected claim or a patent and it is included in a forest reservation he may relinquish and "may select in lieu thereof, a tract of vacant land open to settlement not exceeding in area the tract covered by his claim."

The Act of March 2, 1899 (30 Stat. 994) provides that the company may select "an equal quantity of non-mineral public lands so classified as non-mineral at the time of actual Government survey. * * *

In case the tract so selected shall, at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and within the period of three months after the tract shall have been surveyed and the plats filed in the local land office, a new list shall be filed; and in case such tract as originally selected and described in the list filed in the local office, shall not precisely conform with the line of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity."

It will thus be observed that neither the Act of 1897 nor of 1898 contains any provision whatever as to the description of the land. The Act of 1897 is silent and it was sometime after its passage before it was held that it embraced unsurveyed land, while the Act of 1898 is also silent upon the subject of description and there is nothing in the Act prescribing what shall be done by the company, and the only limitation that is placed upon it is that *it shall not be entitled to select any but odd-numbered sections.* It does not provide how the company shall designate or describe the land. The fact that the surveyor is required to identify the odd-numbered sections when he makes the survey adds nothing whatever to his duty under the law and his instructions, as he must designate every section and number it whether odd or even. This is true of all the 36 sections of a full township.

Not so in the Act of 1899. In the first place the company must describe the land when it makes the selection "with a reasonable degree of certainty."

2nd. A new list must be filed in 90 days after the plats of survey are filed in the local office describing it according to the survey.

3rd. If the tracts in the original list do not precisely conform to the lines of survey the company is permitted to describe such tract anew so as to secure such conformity.

This latter provision can have no meaning whatever if a selection in terms of a future survey only is used. There could be no lack of conformity when there was no original description except that which the surveyor would give it, and when he does so, then to say that precisely the same description under any possible circum-

stances would lack conformation with the same number and description seems to us so utterly untenable that we are surprised it should be insisted upon.

Counsel for appellees in their brief at page 34, referring to this form of description say:

> "Speaking generally, it is, perhaps, the very best method of designating or describing unsurveyed lands that could be devised."

The Department, although sustaining such description in the Daniels' case, supra, not because it was the "very best method of designating or describing land," but because it was in the "vicinity" of established lines of survey and might for that reason be made certain and for the further reason that it had been permitted theretofore, denounced this favorite method of counsel, in the following language:

> "While the metes and bounds description of selected unsurveyed land should always have been, as it now is, required, etc."

In the Hanson case, supra, the Department said:

> "At the time this motion was entertained, this Department had grave doubts as to the sufficiency of such description as against the claim of settlers subsequently initiated, and there was under contemplation the formation of regulations which would give *more precision* to such selections and afford *settlers* greater security in the matter of *initiation* of claims for such lands."

In the Hyde case, supra, it was said:

> "An application to make forest lieu selection of unsurveyed lands not identified with reference to natural boundaries or monuments or

such markings on the ground as would constitute notice to intending settlers, is no bar to the attachment of rights under the Act of May 14, 1880."

In that case it is further said:

> "He might have selected surveyed public lands of the United States, vacant and open to settlement, and upon proof of their non-mineral character and non-occupancy concurrent in time with the selection, he might have completed title thereto without delay; but if he selects unsurveyed lands *it is a matter of his own choice and made at his own risk.*"

The same is true in the case at bar. The company was not bound to select unsurveyed lands but did so as a matter of choice, and if not so described as to give notice to others intending to initiate claims to the same lands, it must take the risk of the initiation of valid claims by settlers who had the right under the Act of 1880 to make settlement of unsurveyed lands. They were required however, to so designate the land settled upon by marking on the ground, blazing the trees, or notices posted so as to give notice to everyone of the exact location of their claims.

We are sorry counsel felt it incumbent upon them, as we must assume, for the purpose of influencing this court, to print as an appendix to their brief, the Departmental decision in the case of Kip Calkins Miles, et al, vs. N. P. Ry. Co., rendered February 16, 1915. We referred to this decision in our original brief and are indebted to counsel for having it printed in full, as it shows clearly that in the motion for rehearing upon which this decision was rendered it was asked that "the facts as to the mineral classification of the lands, the lack of prox-

imity of established Government surveys, as well as the other facts as fully shown in the hearing in the Miles' case, be set out in any decision made."

This case in which a hearing had been had against the company's selection was argued orally in the Department. The Daniels case an application to make homestead entry, which was never mentioned in argument, was taken up and made the leading case and the Miles and other cases embraced in the petition for supervisory authority ruled by it. The only apparent reason for this action lies in the fact that the land in the Daniels case was within three-quarters of a mile of the surveyed western boundary of the township, while in the Miles case the land was 12 miles from a surveyed line from which measurements could have been made; and as the Department had held in the Daniels case the "vicinity" of an established line of survey made a description in terms of a future survey reasonably certain, we asked that the Miles case be distinguished from it for this reason. Moreover, the question of the sufficiency of the description in terms of future survey was not raised in the Daniels case as it was in the Miles case. Daniels' application to enter was rejected for conflict with the selection of the company, whereupon he filed an application to contest, alleging as set out by the Department at page 382 of the decision, "that the selection was illegal and void, inasmuch as the company had *wholly failed to post notice on the land.* And that he had no notice actual or constructive of the selection at the date of his settlement.

In the motion for rehearing in the Miles' case we filed a letter from the Commissioner as to the survey and made it part of our brief. In that letter among other things the Commissioner said:

"As to what difficulty, if any, a reasonably competent surveyor would have had in locating on June 21, 1901, with reasonable certainty, what would be technical legal subdivisions in Tp. 43 N. R. 3 East and Twp. 44 N., Rgs. 2 and 3 East, it will be observed that the 9th Standard Parallel, the south boundary of Tps. 45 N. Rgs. 1, 2 and 3 East, had been established in 1897; the south boundary of T. 43 N. R. 2 East in 1899, and the east boundaries of Twps. 43 and 44 N. R. 1 East in 1891 and 1900.

It is therefore apparent that a very considerable amount of preliminary work would have been necessary to define, with reasonable certainty, what would be technical legal subdivisions in T. 44 N. Rgs. 2 and 3 E., and T. 43 N. R. 3 East, especially in T. 44 N. R. 2 E., where the nearest established corners were the southeast corner of T. 43 N. R. 2 East, and the SE corner of T. 44 N., R. 1 E., from which former corner lines approximately twelve miles in length had to properly coordinate before any subdivisions in T. 44, N. R. 2 East could be determined, presuming the subdivisional lines were to be run, as they were ultimately run in 1904, from the south and east to the north and west, and the same observations apply to the subdivisions in Twp. 43 and 44 N. R. 3 East, by reason of the fact that the southeast corner of T. 43 N. R. 2 East was the only corner from which technical subdivisions could be located and then only after the exterior lines of the two townships had been established and co-ordinated."

It is seen the Department not only ignored the information from the records of the survey stated in the letter of the Commissioner, but declined to state the facts as therein contained and evaded what seems to us to have been clearly the duty of the Department, especially since the courts hold the finding of facts to be conclusive. Of course a statement of the facts would have shown

clearly the case did not fall within the rule laid down either in the Daniels' case, that of Judge Dietrich in this case, or by the Circuit Court of Appeals and the Department would necessarily have had to reverse its decision or else grant the motion for rehearing and decide the case against the company. The same is true as to the classification. There is a clear failure to state the facts. Are we wrong, therefore, in saying the Department has not been quite fair to the settlers in these cases against the company?

Again, counsel refers at page 13, of their brief, to the case of Delany vs. The N. P. Ry. Co., 45 L. D., 6, as showing the intolerable consequences which would result if the rule for which we argued as to the lack of a grantee were adopted. This is a most remarkable wail coming from a private corporation which claims the right to select as the successor of another company to which the privilege was granted, nearly a half million acres of the most valuable public lands in the eight principal public land States, in lieu of worthless mountain ranges of scarely any value. The company has no equities whatever. Moreover, if the grant fails, or if the Railway Company has no right to make selection, or the selection fails for any other reason, the scrip will be returned and is much more valuable than it was when located. And, if Congress intended to grant to be to the Railway Company, the previous success of that company in getting all it is equitably entitled to enables us to assume it will get it in such case.

This court did not hesitate to hold the Department was in error in construing the grant to the Railroad Company as having its eastern terminus at Ashland, instead of at Superior, as had been held by the Department, and large bodies of land patented to settlers and

the consequences seemed much greater than in this case. See U. S. vs. N. P. R. Co., 177 U. S., 435. "There can be no intent of a statute not expressed in its words." Lewis Sutherland on Statutory Construction, 2nd Ed., Sec. 388.

> "The intent of the law must first be sought in the language of the statute itself." Ibid Sec. 366.

In U. S. vs. Graham, 110 U. S. 219, this Court said:

> "When the language of an Act is so clear and explicit as not to be open to constriction, its construction cannot be changed by the practice of the Departments however long continued."

In Sh. P. M. & M. Ry. Co. v. Phelps, 137 U. S. 528, this Court, Mr. Justice Lanear delivering the opinion, said: (syllabus):

> "Where a statute is clear and far from all ambiguity, the letter of it is not to be disregarded in favor of a mere presumption as to what is the policy of the government, even though it may be the settled practice of the department."

The rule is thus stated in A. & Eng. Enc. of Law, Vol. 23, at page 299:

> "The duty of the Courts is not to make the law reasonable, but to expound it as it stands according to the real sense of the words used."

Again at page 302 of the same volume it is said:

> "The question is, not what the legislature meant, but what it said."

A word now as to the facts in the Delany case: This case is now in the United States District Court in Idaho in an action brought by Delany to require the company

to hold the title obtained in that case in trust for him. The State applied for survey under act of 1894 and within the time provided after survey, filed its selection of the tract. After date of the State's application the company also selected it under the Act of 1899. Delany settled under the Homestead Law after the State's application and after the selection of the company. When the State selected the land within the time allowed under the statute, it was clearly the duty of the Land Department to cancel and reject the company's selection. Letts vs. N. P. Ry. Co., 37 L. D., 37. It was not done, however, and after a twelve year's fight against the State its selection was cancelled June 28, 1915, in favor of Delany. At this juncture we have the remarkable spectacle of the Department invoking some ancient decisions under the contest law, under which a second or subsequent contest application might be held to await the action on the first, and holding them, like the circular under the Act of June 4, 1897, as applicable, thus keeping its selection alive while Delany made the fight against the State and thereby defeating his claim and patenting the land to the company. It strikes us no greater injustice under, what this court so plainly stated, in the case of Daniels vs. Wagner, 237 U. S., 547, as the claimed "unlimited, undefined discretion of the Department," could be done a citizen than has been done in this case in depriving Delany of the rights to which he was entitled and would have been accorded, but for this assumed discretion in applying the doctrine held under an entirely different statute. It was not done under any circular, neither was any precedent under a similar statute found that would enable the Department to keep alive the selection of the Company which should have been cancelled when the State's selection was allowed, and if not then, certainly when the Hyde case was

decided. But, without any notice to Delany, this old selection was permitted to lie dormant during all the years of his struggle as a settler on the land and his fight with the State until he succeeded in defeating the State when the company's selection turns up. Oh, what a terrible calamity it would be to hold the settler in such case had rights superior to those of the company! How unfair and unjust it would be. Again we ask, are we justified in our statement that the Department has been hardly fair in its treatment of the settlers in their conflict with the company?

But, counsel in this case, seek to throw the blame for any loss sustained, upon West, for not making inquiry as to other claims, especially that of the company. At page 59 of their brief they say:

> "No one was misled or prejudiced by the fact that the Railway Company pursued the approved practice instead of adopting a different method * * *. And it cannot be pretended that appellant's position would be any different or better if the Department had construed the act differently and had required a different course of procedure. Certainly he would not have been benefited if the selection list had described the land by metes and bounds or in some other manner, since his evidence is to the effect that he made no inquiry at or examination of the records of the local office and was unaware that any selection list had been filed."

We have carefully examined the evidence in the record and fail to find a single statement of West to this effect. He bought the improvements of Hanson who showed him the blazed lines around the land with notices of his claim posted thereon, dated May, 1902.

John Devegio (Tr., page 32), testified:

> "I made inquiry of the receiver of the land office here if there was anything against the land up in Marble Creek and I gave him the best description I could and asked him if any claims were being made to that land, and he looked at the record and told me there was nothing on record and said: 'The land is unsurveyed and subject to squatter's right. *The Government will protect you until it is surveyed.*'"

Newton J. Glover, another witness for West, testified (Tr., 38 and 39):

> "I never heard the Railway Company claimed this land prior to 1905; I went to the land office in July, 1901, and made inquiry as to this land; there was nothing in the record about it; it was open for homestead settlement."

It may be remarked in this connection that if the company had given such a description as has been required since November 3, 1909, in the general circular applying to all classes of claims to unsurveyed land, which the Department held should have been always required, there would have been a metes and bounds description with a *notice posted on the land* and an approximate section town and range description also; or even that of December 18, 1899, under the Act of June 4, 1897, (29 L. D., 391), requiring notice of the selection of unsurveyed land to be posted on the land and in the local office it would have been identified on the ground. If this had been done, as in our judgment the statute clearly requires, the appellant certainly would not have undertaken to make settlement on the land and would have saved the outlay of $2,800 expended on the land and

fourteen years of residence. It comes with bad grace from the company to insist that a description which the Supreme Court of Idaho has held, and as we have seen this court has held in more than one case, is so indefinite that the State could not identify the land granted to it by such description and the company could not by a private survey even, so designate the odd numbered sections as to prevent an action for trespass for cutting timber upon the land which their survey demonstrated was an odd numbered section and was the property of the company, was, nevertheless, sufficiently definite to give notice to all intending homestead settlers. It seems to us nothing could be more illogical and unreasonable than such contention.

Counsel at page 28 of their brief assert. that neither the question of classification under the Act of 1895 or by the surveyor at the time of survey, nor the so-called successorship are before the court as no such questions are in issue under the pleadings.

It is a little late to make this suggestion after these questions were all considered by the District Court without objection on the part of appellees except, possibly, classification under Act of 1895, and were properly reserved in the assignment of errors in the Court of Appeals and in this Court.

In Paragraph 12 of the complaint (Tr., pp. 5 and 6) after setting out the acts of West under his homestead claim, it is stated that the appellant "was and at all times since has been and now is, the owner and lawfully entitled to the patent for and a legal title to said premises."

In Paragraph 13 it is alleged that the acts of the defendants concerning the selection and the acts and proceedings of the Commissioner and Secretary in connection therewith, and in the issuance of patent are and were contrary to and without authority of law, and in

violation of the rights of the plaintiff, and that at date of initiation of the railway claims it was wholly without authority of law to select or claim the said lands, and that the Act of Congress of March 2, 1899, under which the company based its rights, is unconstitutional and void and confers no right whatever upon defendants to select the land. The Railway Company, in Paragraph 8, of their answer, alleged that the land at the time of selection was unsurveyed public land of the United States, non-mineral in character, not reserved and to which no adverse right or claim has attached or been initiated; that said land was so classified as non-mineral at the time of actual Government survey; that on said 21st day of June, 1901, this defendant duly made selection of said land under the provisions of the Act of Congress approved March 2, 1899; * * * that said selection was duly made by filing in the said United States Land Office at Coeur d'Alene, Idaho, a proper selection list or application to select which was in all respects in accordance with the conditions and requirements of the said Act of Congress and the rules, regulations and practice established and approved by the Secretary of the Interior.

The appellant, plaintiff below, in his reply to the answer stated:

> "That his bill is true and sufficient as averred, and that he is ready to prove it, and that the answer of the defendant is untrue and insufficient."

It seems to us clear these pleadings sufficiently raise the issues of the right of the Railway Company to make the selection, whether the acts alleged to have been performed by it are legal and a compliance with the law, as well as the *character* of the land as prescribed by the Act. The square denial of the plaintiff put them in issue.

CONCLUSION.

In conclusion we submit that, under the construction of the Act of March 2, 1899, contended for by counsel for appellees, the Act of May 14, 1880, authorizing the initiation of homestead claims by settlement, is practically repealed by the Act of May, 1899. For, if the company can select unsurveyed lands without any notice other than that in terms of a future survey, which land can be identified only when surveyed, as held by this court, then settlers must do so at their peril and in the language of Secretary Adams quoted from in our original brief."

> "After he has gone upon the public domain in pursuance of such lawful design and marked his claim and perhaps cultivated and improved it, may be awakened years thereafter to find that it is lost to him by reason of a prior appropriation of which he had no notice either in law or in fact. The proposition, therefore, seems to lead to a preposterous result and in my opinion cannot be entertained."

Whatever may be said, this is clearly the practical effect. Did Congress intend this result? Will anyone insist it was its purpose to put actual settlers it had invited to make their homes on the public lands in such a precarious condition, in the interest of a private corporation? We apprehend not.

In K. P. R. Co. vs. Prescott, 83 U. S., 603, this court speaking through Mr. Justice Miller referring to such settlers said:

> "The policy of the Government has been for years to encourage settlement on the public land by the pioneers of emigration, and to this end it

has passed many laws for their benefit. This policy not only favors the actual settler, but it is to the interest of those who, by purchase, own adjacent lands, that all of it should be open to settlement and cultivation."

In the case of N. P. Ry. Co. vs. Amacker, 175 U. S., 564, this court speaking through Mr. Justice Brewer said:

> "The contest in this case is between one claiming under a homestead entry and the company claiming under a grant in aid of the railroad. It was long ago said by this court that the policy of the Federal Government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements over that of any other person. * * * It is not, therefore, strange that the rulings of the Land Department, as well as of the courts, have been uniformly favorable to the individual contesting with a railroad company the right to a particular tract of land."

In the case of Ard vs. Brandon, 156 U. S., 537, Mr. Justice Brewer, again speaking for this court said:

> "The law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon. If he does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone up the question whether or not he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application."
>
> "The policy of the Federal Government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the

purchasers of a limited extent of land, comprehending their improvements over that of any other person. Clements vs. Warner, 65 U. S., 394."

In view of this universally held doctrine we again ask whether it be possible Congress intended by the enactment of the law of March 2, 1899, to practically defeat the rights of settlers upon unsurveyed lands in eight of the public land States including nearly all of the northwest? No one disputes the proposition that where there are no visible marks on the ground anyone who settles must take the risk of being on land selected by this company of which he has no notice and can have no actual knowledge. We do not believe this court will sustain such a position.

Because of the fact that this scrip may be located any place in the States through or into which the road runs, it is not possible, as it was before that Act, to know with certainty the location of any lands to which a claim by the Railroad Company can be lawfully asserted. It is a possible claimant for any land situated anywhere in any of these eight great public land States in the northwest. When Congress chartered the Northern Pacific Railroad Company (Act of 1864), and granted to it an empire of public lands, it was as a *transportation* company, which was then the crying need of the country. But under this Act and that of 1898, it has gone into the scrip business on a gigantic scale, and with the single exception of soldiers additional, was made the owner of the largest body of scrip ever issued by the Government. With this scrip it can take the even numbered sections in its grant and thereby become the owner, contrary to the entire policy as to railroad land grants, of solid bodies of the finest timber and other lands on the pub-

lic domain. And yet, it asks for a liberal construction of the Act and its counsel put up a pathetic wail over the great hardship that will result to it by holding it did not give settlers sufficient notice of its claim to unsurveyed lands, and they were, therefore, misled into the expenditure of thousands of dollars in improvements and, in this case 14 years of residence.

Respectfully submitted,

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Washington, D. C.
April, 1917.

SUBJECT INDEX

Page

STATEMENT 1-2-3

ARGUMENT:—

Three principal questions are presented by the record:

1. The grant by the Act of March 2, 1899 having been made to the Northern Pacific *Railroad* Company, a great corporation created by Act of Congress and to which the Government had theretofore granted approximately forty-three million acres of land a part of which it was authorized to reconvey, could a selection be made by the Northern Pacific *Railway* Company, a separate and distinct corporation under a State charter granted by the State of Wisconsin, upon the sole ground that because of its purchase of the property and franchises of the Railroad Company under forclosure sale, it was its successor in interest? And the Railroad Company having no existence at date of the Act was there any grantee in existence to take the grant? 10

2. The lands having been classified as mineral under the Act of March 26, 1895, which classification was approved by the Secretary of the Interior March 26, 1901, a date prior to the selection by the Company, and the surveyor having failed to make any classification in terms as non-mineral, was the land subject to selection by the Company under the Act of March 2, 1899?..... 10

3. If the Railway Company was authorized to make the selection, and if the land was subject to the selection at the date it was made, was the description given of the land selected in terms of a future survey, a compliance with the requirement of the statute that it should be designated with "a reasonable degree of certainty," so as to bar the rights of settlers in good faith without actual or constructive notice? ----------

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

ANDREW WEST, *Appellant*,

v.

EDWARD RUTLEDGE TIMBER COMPANY AND NORTHERN PACIFIC RAILWAY CO. } No. 695.

APPEAL FROM CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLANT.

STATEMENT.

This is a suit by Andrew West in the District Court of the United States for the District of Idaho, Northern Division, to have the defendant and Edward Rutledge Timber Company declared a trustee of the title to the Southeast quarter of Section 20, Twp. 44, N. Range 3 East, Boise Meridian, Idaho, for his use.

The plaintiff bases his claim upon his settlement before survey, followed by his residence, and cultivation in compliance with the homestead law.

The Railway company claiming to be the successor of the Railroad company filed its list of selections No. 61, in the proper local land office June 21, 1901, under the provisions of the Act of March 2, 1899, designating it as the *"land which when surveyed will be described"* as above. Later, to-wit, on July 31, 1905, the company filed its new selection list describing the land by its legal subdivisions as surveyed. The plat of survey was filed in the local office July 17, 1905, and patent issued to the Railway company October 13, 1910.

The timber company is the successor of the Railway Company. When the selection list was filed the nearest surveyed line, as found by the Court was the township next north of the one in controversy.

West settled May 15, 1903, having bought the improvements of John Hanson, a previous settler and continued to comply with the homestead law, and on July 17, 1905, filed in the local office an application to make entry, which was rejected for conflict with the selection of the Railway company which action was subsequently affirmed by the Commissioner and later by the Secretary of the Interior.

Both defendants set up title acquired by the patent issued to the Railway Company and the conveyance by it to the Timber Company.

The District Court held West was a qualified homesteader and proved sufficient compliance with the law to entitle him to patent, but that the railway company had acquired a prior and superior right under its selection.

Upon appeal this decision was affirmed by the Circuit Court of Appeals for the Ninth Circuit. West appealed to this Court and his assignment of errors brings the whole record before the Court for consideration and decision.

ARGUMENT.

History of the Act, the Class to Which it Belongs and Its Proper Construction.

I

The Interior Department in stating the history of the Act said:

> "It was deemed necessary to the accomplishment of its purpose that the United States should own the land placed in reservation by the Act. A voluntary conveyance by the Railway company was the most feasible method of reacquiring title to the land, and a right of exchange upon the terms and conditions set forth was the consideration offered to induce the company to transfer its title. An offer is made by one party of which acceptance by the other is invited. The Act is contractual in character and terms and conditions not clearly expressed are not to be lightly imposed after acceptance of the offer." (State of Idaho v. N. P. Ry. Co. 37 L. D. 135).

The Trial Court in the decision in this case put the matter as follows:

> "The grant was in no sense a gratuity. The Government contemplated the creation of the Mount Ranier National Park, and to carry out the

purpose it was deemed desirable, if not absolutely necessary to procure title to certain lands embraced in the land grant made to the Railroad Company by the Act of July 2, 1864. For these it was willing to exchange other lands, which it owned, and by the Act it proposed to make such exchange."

This view urged to show the intention of the Government, and its needs, and hence to give the Act a more liberal construction, is not borne out by the records of Congress. No Department nor other Executive officer *initiated* nor so far as we have been able to ascertain, after diligent investigation, even *approved*, the creation of this Park and the passage of this Act. On the contrary, the bills were introduced in the 54th Congress in the Senate by Senator Wilson, and in the House by Mr. Lewis, both of the State of Washington, who were understood to be friendly to the Railroad Company. The bill was passed, *signed by the Speaker March* 3, 1897, *but was not approved by the president.*

Copies of these bills were introduced in the succeeding Congress, again passed, and approved March 2, 1899.

It is well known that where such legislation involving the creation of parks or other public reservations is desired by the Government, a request or recommendation is always made by the Forest Service or the Interior Department, or at least a recommendation or approval of bills introduced in Congress. The courts have a right to consider the history of steps taken in enactment of the law. U. S. v. Burr N. 159 U. S. 85.

THE CLASS OR CLASSES TO WHICH THE ACT BELONGS AND ITS PROPER CONSTRUCTION.

As we have seen, both the Interior Department and the Trial Court held the Act is contractual and is an option given the company to convey lands acquired as part of its grant and to permit it to select other non-mineral public lands, surveyed or unsurveyed, not within the limits of its grant only, nor even of the State, but within any State through or into which its road runs which, includes the States of Michigan, Wisconsin, Minnesota, North Dakota, Montana, Idaho, Washington and Oregon. The company was limited to a certain class of lands to be "classified" in a certain manner by a specified officer and when the land was unsurveyed it was required to be described in a special manner, and the company was required to file a new list after survey. If this view of the class to which the Act belongs is correct, it is strictly an option and must be accepted if at all in the precise terms of the offer, which terms and conditions must be strictly complied with, and hence the Act must have a strict construction and the company must have brought itself within the precise terms and conditions written into the statute by its friends, if not by its officers or attorneys, to sustain its selection thereunder.

The true rule in such cases is thus stated in Cyclopedia of Law and Procedure, Vol. 9, pp. 265 and 276:

> "The offerer has a right to prescribe in his offer any condition as to time, place, quantity, mode of acceptance or other matters which it may please him to insert and make a part thereof and the acceptance to conclude the agreement

> must in every respect meet and correspond with the offer neither falling within or going beyond the terms proposed, but exactly meeting them at all points and closing with them just as they stand.
>
> An acceptance, to be effectual, must be identical with the offer and unconditional." see also Vol. 3, p. 852.

In the case of Carr v. Duval, et al., 14 Pet. 77, the Supreme Court quoting Eleason v. Henshaw, 4 Wheat 228 held:

> "An offer of a bargain by one person to another imposes no obligations upon the former, unless it is accepted by the latter, according to the terms under which the offer is made."

In the case of Minn. and St. L. Ry. Co., v. Columbus Rolling Mill Company, 119 U. S. 149, it was held:

> "A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer and puts an end to the negotiation."

III.

THE ACT OF MARCH 2, 1899, IS A SPECIAL ACT AND REQUIRES STRICT CONSTRUCTION.

In the case of the Northern Pac. Railway Co., 40 L. D. 441, in which case the company was seeking to obtain the right to select lieu lands for the glaciers in the Mt. Ranier park, under this Act, it was held:

> "The Department is convinced that it was not the intention of Congress that such areas should be surveyed or disposed of as a part of the public land of the United States, and that the grant to the Northern Pacific Railway Company did not convey the same. If there be any doubt in the construction of the granting act in this respect, it must be resolved against the railroad company under the settled rule that such statutes are to be strictly constructed against the grantee, Wis. Central Railroad Co. v. U. S. 164 U. S. 190."

In the case of Comstolk v. N. P. Ry. Co. 34 L. D. 88, The Department held that the Act of March 2, 1899, is a *special statute* and therefore the amendment to the Forest Lieu Act of March 2, 1897, dated June 6, 1900, limiting selections under that Act to surveyed land, did not affect the right of the company to select unsurveyed land for the reason that *it is a special Act*, while the Act of March 2, 1897, is a general statute; likewise, when the Act of 1897 was repealed it was held that because the Act of March 2, 1899, is a *special statute* it was not affected by the repeal of the Forest Lieu Act.

In the case of Idaho v. Northern Pac. Ry. Co., 42 L. D. 118, the Department having under consideration the Act of August 18, 1894, authorizing the State to make application for survey with a view to selection of the lands in lieu of losses, held:

> "This was a statute granting a special privilege as against others seeking to appropriate public lands. It was held by Judge (now Justice) Lurton, in Campbellsville Lumber Company v. Hubberd 112 Fed. 718, concurred in by Judge (now Jutice) Day, that: 'An attentive consideration of the principle of statutory construction here involved leads us to conclude that when a statute gives a new and unusual remedy, and directs how the right to the remedy is to be acquired or enjoyed, and how it is to be enforced, the Act should be strictly construed; and the validity of all acts done under authority of such an act will depend upon a compliance with its terms. In respect to such acts the steps pointed out for the acquisition, preservation and enforcement of the remedies provided should be construed as mandatory, rather than optional.' "

The Court cited Sutherland on Statutory Construction Sections 454 and 458 which were set out by the Depart-

The American and English Encyclopedia of Law Vol. 23, p. 407, states the rule as follows:

> "Acts conferring special privileges upon or granting public property to private individuals or corporations are construed strictly against the grantees and in favor of the State."

Again at page 402 of the same volume it is said:

> "When a statute gives right or remedy which did not exist at common law, and provides a specific method of enforcing it the mode of procedure provided by the statute must be pursued strictly."

In the case of Slidell v. Emler, 111 U. S. 412, the Court said:

> "Where a statute operates as a grant of public property to an individual, or the relinguishment of the public interests, that construction should be adopted which will support the claim of the Government rather than that of the individual."

In discussing this rule of construction the U. S. Supreme Court in the case of Dubuque and Pacific RR. Co. v. Litchfield, 64 U. S. (23 How.) 166, said:

> "The reason of the above rule is obvious—parties seeking grants for private purposes usually draw the bills making them. If they do not make the language sufficiently explicit and clear, to pass everything that is intended to be passed, it is their own fault; while, on the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking, by ingenious interpretation and insinuation, that which cannot be obtained by plain and express terms." Charles River Bridge v. Warren Bridge 11. Pet. 420; Barden v. N. P. RR. 154 U. S. 312; Cornell v. Coyne 192 U. S. 432; and Hannibal & St. Joseph Ry. Co. v. Mo. River Packet Co. 125 U. S. 260.

It may well be said, as was stated by counsel in the very able brief filed by them in the Circuit Court of Appeals, that in "their opinion the hand of the Rail-

road Company is seen in the drafting of the bill which became the law of March 2, 1899, for the reason that while the Railroad Company is given the right to select from the surveyed and *unsurveyed* public lands of the United States, the settler upon the lands sought to be set aside as the Mt. Ranier National Park is granted in lieu of his right, the right to select *only* surveyed lands. The Act in question to this very material extent prefers the railroad company over the settler. Under these conditions and circumstances it is not believed that the aid and encouragement of the courts ought to be given in further extending these rights of preference by construction of the Act in question in favor of the grantee who has thus sought and obtained an advantage over the settler who surrenders equal rights to such grantee."

In the case of Newton v. Commissioners, 160 U. S. 548 it was said:

> "The rule of interpretation in cases like this, as against the State, is, that nothing is to be taken as conceded but what is given in express and explicit terms or by an implication equally clear. Silence is negation and doubt is fatal to the claimant."

The Court in that case quoted approvingly the doctrine announced in the case of Tucker v. Ferguson 89 U. S. 22.

In the case of the Northwestern Fertilizing Company v. Hyde Park, 97 U. S. 659, the Court said:

> "The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative

> must be shown. Silence is negation, and doubt is fatal to the claimant. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this country."

Notwithstanding these well settled rules of construction applicable to the grant in this case, every decision, circular, or practice cited either by the Department, the trial court, or the Circuit Court of Appeals is based upon statutes of a remedial nature requiring liberal construction.

IV.

TERMS OF THE ACT OF MARCH 2, 1899.

Having considered the history of the Act, its character as an optional contract as well as a special statute granting to the company the public property of the United States, we will now consider the exact terms and conditions under which the company could acquire title, for, as held by this court, in Rector v. Ashley 73 U. S.

> "The rights of a claimant are to be measured by the Acts of Congress, and not by what he may or may not be able to do; and if a sound construction of these acts shows that he had acquired no vested interest in the land, then, as his rights are created by statute, they must be governed by their provisions whether they be hard or lenient."

See also Raleigh & G. R. Co. 13 Wall 269 and Stevens v. Smith 10 Wall, 321, to the same effect.

The Act of March 2, 1899 (30 Stat. 990) is an Act to set aside certain public lands to be known as the Mt. Ranier National Park. By Section 3 the Northern Pac. *Railroad* Company, upon relinquishing to the Government the land comprised by the Park, which had been theretofore granted to the Railroad Company, was authorized "to select an equal quantity of non-mineral public lands, so classified as non-mineral at the time of actual Government survey, which has been or shall be made, of the United States, not reserved and to which no adverse right or claim shall have attached or had been initiated at the time of the making of such selection, lying within any State into or through which the railroad of said Northern Paciefic Railroad Company runs, to the extent of the land so relinquished and released to the United States."

Section 4 provides:

> "That upon the filing by the said Railroad Company in the local land office of the land district in which any tract of land selected and the payment of the fees prescribed by law as in analagous cases, and the approval of the Secretary of the Interior, he shall cause to be executed, in due form of law, and delivered to said company a patent of the United States conveying to it the lands so selected. In case the tract so selected shall at the time of selection be unsurveyed, the list filed by the company at the local land office shall describe such tract in such manner as to designate the same with a reasonable degree of certainty; and within the period of three months after the lands including such tract shall have been surveyed and the plats thereof filed in said local land

office, a new selection list shall be filed by said company, describing such tract according to such survey; and in case such tract as originally selected and described in the list filed in the local land office, shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity."

STATUTE UNIQUE.

This statute is unique in at least four particulars:

1. It requires that where land is unsurveyed the company in its selection *must describe the land with a reasonable degree of certainty.*

2. To be subject to selection it must be not only nonmineral in fact, but must have been *classified as non-mineral at the time of actual Government survey.*

3. Within three months after the plats of survey are filed in the local office a *new list* must be filed describing the tracts according to such survey.

4. If original selection shall not conform with the lines of the official survey the company shall be permitted to describe it anew so as to secure conformity.

No other statute, requiring the same construction, has ever been passed by Congress for the disposal of the public lands. By an agreement between the Department of the Interior and the Department of agriculture it was

decided that the company was entitled to select 444,222 acres in lieu of the estimated quantity of land conveyed to the United States. This is practically a half million acres, is equal to 700 square miles, or 19½ Twps., being an area more than half the size of the State of Rhode Island, and yet it is conceded by the Department and the Courts no circular was ever issued by the Department governing the selection and patenting of the lands to which the company would be entitled under this *unusual* statute; but, so far as the description of the land is involved in this case, as we shall show, *circulars under general statutes entitled to liberal construction have been cited to support what is conceded to have been a bad practice so shadowy and uncertain as that no authority could be cited sustaining it.*

V.

THE ISSUES PRESENTED BY THE RECORD.

This case presents three principal questions:

1st. The grant having been made to the Northern Pac. *Railroad* Company, a great corporation created by Act of Congress, and to which the Government had theretofore granted approximately forty-three million acres of land a part of which was to be reconveyed, could a selection be made by the Northern Pacific *Railway* company a separate and distinct corporation organized under the laws of Wisconsin, upon the ground that because of its purchase of the property and franchises of the *railroad* company under forclosure sale, it was its successor in interest?

2nd. The lands having been classified under the Act of March 26, 1895, as mineral, which classification was approved by the Secretary of the Interior March 26, 1901, a date prior to the selection by the company, and the surveyor having failed to make any classification in terms as non-mineral, was the land subject to selection by the Company under the Act of Mar. 2, 1899?

3rd. If the Railway Company was authorized to make the selection, and if the land was subject to the selection at the date it was made, was the description given of the land selected, in terms of a future survey, a compliance with the requirement of the statute that it should be described with *"a reasonable degree of certainty,"* so as to bar the rights of settlers in good faith without actual or constructive notice?

We will take up these questions in the above order.

FIRST.

Grantee Named In Act of March 2, 1899, Not In Existence at that Date and Grant Void.

The Trial Court referring to this question, stated:

> "It is, however, argued that as a matter of law, it would be held that the railway company could not be an assignee under, or otherwise profit by, the Act, for the grant is to the Railroad company and is not assignable. No decision is cited in support of the proposition, nor does plaintiff assign any reason, and apparently none is imaginable, why Congress should have intended

> to deny the right of assignment, or to confine the operation of the grant to the railroad company to the exclusion of its successors in interest." (Record p. 76).

The Court then cites opinions of the Attorneys General, 21 Ops. 486, 25 Ops. 401, and other authorities. The Court also held:

> "It therefore appears that the construction contended for by the plaintiff would render the Act nugatory. For, if this conclusion is correct, and admittedly it is not open to review upon the record here, it turns out that at the time the Act of 1899 was passed, the railroad company was not possessed of the lands desired by the Government, but that its rights thereto had passed to the Railway Company, and unless we hold either that by inadvertence the Railroad company was named while the railway company was intended, or that the privilege conferred upon the railroad company is assignable, plainly the Act becomes wholly ineffectual for any purpose." (Record pp. 76, 77 and 78.)

The Court evidently misunderstood the point involved. It is not whether the Railway company could *assign* or transfer title to lands granted to it under the act of 1864, but, whether the new grant of 1899, to that company, which then had no existence, could be taken by the Railway Company, as a substituted grantee, and in its own name select the land granted.

Attorney General Harmon in the opinion cited by the Trial Court (21 Ops. 486) dated Feby. 6, 1897, in answering the question submitted advised that the Department should act upon applications for patents by

the Railway Company under its grant upon the same considerations which should govern it in case there had been no forclosure and applications had been made by the old company.

In that case the Attorney General pointed out that prior to the date of the Act of March 2, 1899, both the property and franchises of the Northern Pacific *Railroad* Company had been sold and transferred to the Northern Pacific *Railway* Company.

This question was again submitted to Attorney General Moody, who on April 12, 1905, held that the opinion of his predecessor was correct and that the Department should continue to be governed by the rule there laid down.

By Act of July 2, 1864, a Federal corporation, known as the Northern Pacific Railroad Company, was created and the first Board of Directors named therein. Said Act is referred to constantly as the "Charter" of said corporation and is so referred to in the Joint Resolution of May 31, 1870. By the last Section in said Act of 1864, it was expressly declared that Congress should have the right to add to, alter, amend or repeal the Act.

Section 10 of the Act expressly provides:

> "No mortgage or construction bonds shall ever be issued by said company on said road, or mortgage or lien made in any way except by the consent of the Congress of the United States."

The Joint Resolution of 1870, authorized the Railroad Company to mortgage all its property and franchises, *including the franchise to be a corporation.*

The record of the forclosure reveals the fact that the franchise to be a corporation was mortgaged, as authorized by said Joint Resolution, the complaint asked for its sale, the Company in its answer admitted the facts stated in the Bill, the decree specifically provided for its sale and *it was sold* to a committee of the bondholders of the Company in August 1875. (See Smalley's History of the Northern Pacific Railway Co. p. 209.)

It is conceded that the Railway Company, the present claimant, as successor in interest, was organized and a charter granted in Wisconsin in 1896.

What is the effect of these transactions on the question of the existence, or nonexistence of the Northern Pacific Federal corporation in March 2, 1899, the date Congress made the grant to it?

The opinions of Attorneys General Harmon and Moody that the Railway Company is the successor in interest of the Railroad Company and that patents for lands *granted by the Act of 1864* might be issued to it, even if sound, presents an entirely different and irrelevant question. These opinions may be conceded to be right, and yet they in no wise affect the question at issue and we must be permitted to say that in view of the uniform holding of the Department that they are separate grants and that the Act of 1899 was no part of the adjustment of the grant of 1864, and hence the Act of 1895 providing for the classification of the lands granted by the Act of 1864, as well as other acts, had no bearing upon the execution of this Act, because it was a *private special Act*, we are surprised that these opinions of the Attorneys General are made to do duty in behalf of the Railway Company as if they were applicable.

It is possible Congress assumed there was such a corporation in existence and that it still owned the land to be

conveyed in exchange for the right by it to select other lands as provided, but *Congress was mistaken,* for there was no such corporation and of course no such ownership of the land to be conveyed, nor could it be the grantee to which the grant was made. *There was none,* and hence the grant is void.

The Courts make a distinction between the franchise to operate a Railroad or other Company, and a franchise to be a coporation, holding that if this latter franchise is not sold, it still has an existence, although all its property and all its other franchises have been legally sold. But in this case, as we have shown, this franchise to be a corporation was mortgaged as specifically allowed by the resolution of 1870 and the mortgage duly foreclosed and this frachise specifically decreed to be sold, and it was sold.

If, then, after the sale the franchise to be a corporation, created by Act of Congress and authorized to be mortgaged and sold, had any existence (which we think doubtful), the action of the purchasers in taking out the Wisconsin corporation destroyed any vitality it may have had after the sale. As said by the Supreme Court of Ill. in the case of Poe v. Wayman, 256 Ill. 151, (99 N. E. 941).

"Eternal life is not an essential attribute of corporate existence."

It would seem to be an unusual application of the doctrine of "reincarnation" to hold that the purchasers of this franchise to be a federal corporation, could, by the purchase of the Superior and St. Croix R. R. Co., a Wisconsin corporation, and having the legislature of that State amend it and incorporating in that State under the name of the Northern Pacific *Railway* Company and

increasing its capitalization, so "reincarnate" the entity, or as expressed by some of the authorities, "the soul" of the original Northern Pacific *Railroad* Company, thus abandoned, as to preserve its existence from 1896, until the date of the grant in 1899. Attorney General Harmon in (21 Ops. 486), stated that:

> "Although the Joint Resolution of 1870, *supra*, authorized a mortgage on all the property of this Company, including the franchise to be a corporation, the counsel in charge of the reorganization were certainly justified under the decisions in advising a new Act of Incorporation instead of endeavoring to work out the transfer of the corporate existence of the old company to the new one through the foreclosure proceedings."

It follows that, at the date of the Act of March 2, 1899, the Northern Pacific Railroad Company chartered by Act of Congress in 1864, had no existence and hence there was no grantee to take and the grant is therefore, absolutely void. Pawlett v. Clark 9 Cranch. 331; Hall v. Russell, 101 U. S. 509; Davenport v. Lamb, 13 Wall. 418; C. & O. R. R. Co. v. Miller 114 U. S. 176; Howard v. C. & O. R. R. Co. 122 U. S. 122, and Julian v. Central Trust Company 193 U. S. 93, citing Memphis & Little Rock R. R. Co. v. Railroad Commissioners 112 U. S. 619 Sellers v. Union Lumber Co. 39, Wis. 525 C. Y. C., Vol. 19, p. 1460. "The sale of all the franchises and property of a corporation extinguishes it." Reynolds v. Condge, 11, Pa. co., Ct. Rep. 306; Shields v. Ohio, 95 U. S. 319, and Pacific v. Chicago & St. L. R. Co., U. S. 7, Court of Appeals, Jan. 20, 1892, and 15 L. R. A. 82.

So far as we are aware, this precise question has never been directly passed upon by this Court.

There is no evidence in the record in this case tending to show the right of the Northern Pacific *Railway* Company to select lands under a grant to the Northern Pacific *Railroad* Company.

This Court in the case of Humbird v. Avery, (195 U. S. 480), declined to hold even that the Railway Company is the *successor in interest* of the Railroad Company, contenting itself with the statement in parenthesis that it is " the alleged successor in interest of the Northern Pacific Railroad Company."

Foreclosure suit by the Farmer's Loan & Trust Co. et al., was instituted in the United States District Court for the Eastern District of Wisconsin in 1896 against the Northern Pacific Railroad Company (?) and others on mortgages executed by the Company in May and Sept., 1879, January, 1881, Nov. 20, 1883, Dec. 1887 and Dec., 1889, upon all the property and franchises of the company including the franchise to be a corporation and on the 27th day of April, 1896, a final decree of foreclosure and order of sale of all said property and franchises, including the franchise to be a corporation was made, was ordered sold, and as we understand, was sold to the Northern Pacific Railway Company, a Wisconsin corporation and the sale was confirmed, and the Railway Company claims under this sale. See Heath v. N. P. Ry. Co., 38 L. D. 77.

Another serious question arises whether the right given the company to mortgage under the Joint Resolution of 1870, was not exhausted by the mortgage made that year and which was foreclosed and all the property sold in 1875. If so, the Committee of Bondholders who purchased and called themselves the Northern Pacific Railroad Company was without power to make the mort-

gages upon which said property and franchises were sold to the Northern Pacific Railway Company. However this may not be material to the issues in this case.

From this decision and these opinions it seems clear that by virtue of the forclosure proceedings and Masters sale, not only the property of the Northern Pacific Railroad Company was forclosed and sold but its franchises including the franchise to be a corporation were likewise sold and purchased. That this took place prior to the date of the Act of March 2, 1899, seems to be also conceded. What is its effect as a question of law? Mr. Justice Story in speaking for the Court in Pawlet v. Clark, 9 Cranch 331, held as follows:

> "In general no grant can take effect unless there be a sufficient grantee then in existence. This, in the case of corporations, seems pressed yet further; for if there be an aggregate corporation, having a head, as a Mayor, and commonalty, a grant or device made to the corporation during the vacancy of the headship is merely void; although for some purposes, as to the choice of a head, the corporation is still considered as having a legal entity."

In the case of Hall v. Russell, 101 U. S. 509, Chief Justice Waite, speaking for the Court said:

> "There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee."

Under the Common Law as held in Davenport v. Lamb, 13 Wall. 427, "a grant to a deceased party is as ineffectual to pass the title of the grantor as if made to a

fictitious person; and the rule would apply equally to grants of the Government as to grants of individuals."

If, then, prior to the date of the Act making a grant to the Northern Pacific Railroad Company its property and all its franchises had been sold and conveyed under orders of the Court upon foreclosure of mortgage or trust executed by said Railroad Company it must follow that there was no grantee in existence at the date of the grant to take thereunder. C. & O. Co. v. Miller, 114 U. S. 176; Howard v. C. & O. Co., 22 U. S. 222.

The Supreme Court in Memphis etc. RR. Co. v. Berry, 112 U. S. 609, referring to judicial sale of the franchises of a corporation said:

> "It is not claimed that the assignment of the charter, by way of mortgage and subsequent judicial sale, constituted the purchasers to be the identical corporation that the mortgagor had been; for that would involve an assumption of its obligations and debts as well as an acquisition of its privileges and exemptions; but, it is insisted, that it resulted in another corporation in lieu of the original one, entitled to all the provisions of the charter, by relation to its date, as though it had been organized under it.
>
> But such a construction of the words authorizing a mortgage of the charter and works of the company, is, in our opinion, beyond the intention of the law and altogether inadmissible.
>
> There is no express grant of corporate existence to any new body."

The same is true in the case at bar. The act of 1864, contained a provision prohibiting the company from mortgaging its property or its franchises. The Joint

Resolution of 1870 modified this provision so as to give the company the right to mortgage all of its property and its franchises, but there is no provision authorizing corporate existence to any new body.

The argument of the Trial Court to the effect that such a holding would render the Act ineffectual for any purpose, quoting M. K. & T. Ry. Co. v. K. P. Ry. Co. 90 U. S. 491, loses all of its force when the well settled doctrine of the courts as laid down by Justice Baldwin, speaking for the Court as early as the case of U. S. v. Orredondo 6 Pet. 739, and followed ever since, holding that— "grants of the strongest kind, do not extend beyond the meaning and intent expressed in them, nor by any strained construction, make anything pass against the apt and proper, the common and usual signification and intendment of the words of the grant, and passes nothing but what was owned," is applied. Moreover, Congress is not to be presumed to have used words for no purpose. Platt. v. U. P. Ry. Co. 99 U. S. 58; Allen v. Louisana 103 U. S. 84 and White v U. S. 191, U. S. 551.

The Court also held in Wiggins Ferry Co. v. East St. Louis, 107 U. S. 371, that "it is a rule of interpretation that every grant from the sovereign authority is, in cases of ambiguity, to be construed strictly against the grantee and in favor of the Government." See also U. S. v. Michigan 190 U. S. 401; Ill. Central Ry. Co. v. Ill. 146 U. S. 468; Kean v. Calumet Canal Co., 190 U. S. 488; Wis. Central R. Co. v. U. S. 164 U S. 190; Oregon etc. R. Co. 164 U. S. 539 and Oregon R. & N. Co. v. Oregonion R. Co. 130 U. S. 1.

SECOND.

Land Classified as Mineral and Therefore not Subject to Selection Under the Act.

We come now to the consideration of the question whether the land involved in this case was subject to selection at the date the list of the company was filed, for it will be conceded that if the land was not subject to selection under the Act the company's title must fail.

The decision of the Commissioner sustaining the selection against the claim of West states that the land was classified by the Board of Land Commissioners appointed under the Act of Feb. 26, 1895, during the month of October 1899, which classification was approved by the Department March 26, 1901. (Record p. 64). This was three months before the filing of the company's list. What is the force and effect of this classification, approved by the Secretary, prior to the selection?

The Commissioner held that because the Board of Land Commissioners were instructed, June 25, 1895, (20 L. D. 571) to examine for the purpose of classification, "odd numbered sections within the grant only" (Record page 64) this land which, when surveyed proved to be an even numbered section, the classification was without authority. (Record pages 64 and 65).

We might answer this contention by the conclusive fact that the Secretary notwithstanding this instruction, subsequently approved the classification by the Board, of this identical tract. It will be conceded this instruction was a Departmental regulation only, and when the Secretary subsequently approved the classification it had the effect of either waiving or overruling this letter of the Commissioner of the General Land Office to the Board which was approved by the Acting Secretary and is improperly called a regulation. That it is of later and higher authority we think admits of no doubt whatever.

The Interior Department held in the case of Lamb et el., v. N. P. Ry. Co. 29 L. D. 102, where the Secretary of the Interior approved the classification, that in order to set it aside such a showing of fraud in the classification must be made as would condemn and avoid it, if sustained by proof produced at the hearing. To the same effect is the decision in 29 L. D. 675. The original instructions by the Department under this Act of 1895, signed by Secretary Hoke Smith, Apl. 13, 1895, (20 L. D. 350), did not make any distinction between the classification of odd and even numbered sections and it was not until June 25, 1895, that this distinction was made. The act is plain and unambiguous and needs no construction. State Tonnage Tax cases, 12 Wall 204. Moreover, we insist that the *act* authorizing the classification made no such distinction and that the instructions and decision of the Department, which *has* been followed by the Trial Court and the Circuit Court of Appeals were contrary to both the letter and spirit of that Act. It provides in terms, that the Secretary of the Interior, be, and is hereby authorized and directed, as speedily as practicable,—"to cause *all* lands within the land districts hereinafter named in the States of Montana and Idaho *within the land grant and indemnity land grant limits*

of the Northern Pacific Railroad Co. as defined by Act of Congress entitled etc.," * * * * * "to be examined and classified by Commissioners to be appointed as hereinafter provided, with special reference to the mineral Or non-mineral character of such lands, and to *reject, cancel, and disallow* any and all claims or filings heretofore made, or which may hereafter be made, by or on behalf of the said Northern Pacific Railroad Company on any land in said land district which upon examination shall be classified as provided in this Act as mineral lands."

It is thus seen that *all lands* within the land districts mentioned within the land grant and the indemnity land grant limits of the Northern Pacific Railroad Company were to be examined and classified and the Secretary was instructed by the Act to *reject, cancel, and disallow any and all claims or filings, heretofore made, or which may hereafter be made, by or on behalf of said Northern Pacific Railroad Company classified as mineral lands.*

Section 3 of the Act provides that: "If the lands examined are not surveyed, classification shall be made by tracts of such extent and designated by such natural or artificial boundaries to identify them, as the Commissioners may determine."

Again the instructions relied upon by the Departmental decision, referring to the classification of unsurveyed lands stated: "observing the difference that the land must necessarily be described by natural objects and permanent monuments to identify the same" etc. Why *"necessarily"* so described? Simply because they could not know what would be odd or even sections as recognized by the Secretary as a proper construction of the Act. The instructions issued by First Ass't. Secty. Pierce, July 26, 1910, (39 L. D. 116), for carrying into

effect the extension of the Act of 1895, dated June 25, 1910, repeated this instruction as to unsurveyed land to be classified by the Board.

Section 6 provides that: "As to the lands against the classification whereof no protest shall have been filed as hereinbefore provided, the classification, when approved by the Secretary of the Interior, shall be considered final, except in case of fraud, and all plats and records of the local and general land offices shall be made to conform to such classification."

It is thus seen that where lands surveyed or unsurveyed, odd or even sections are classified by the Commissioners and approved by the Secretary, in the absence of protest, this action is made by positive statute *final* and can be set aside only upon the ground of fraud. Moreover, it is made the duty of the Secretary to have the records of the local and the General Land Offices correspond with this classification and to reject, cancel and disallow any and all claims or filings theretofore made or which may thereafter be made by or on behalf of said Northern Pacific Railroad Company. The attention of the Commissioners was specifically called to the finality of this classification in the Instructions of Apr. 13, 1895, and they were cautioned to exercise great care for this reason.

Now, it is conceded that at the date of selection the tract involved had been classified by the Commissioners under the act of 1895 as mineral, which classification had been approved by the Secretary and the records made to conform to this classification, which, by the terms of the statute is made final, unless attacked for fraud. How then, we ask, could the Railway Company as the successor of the Railroad Company make a valid selection of this land?

The real situation is this:

In june 1901, when the Railway Company made its selection this land was classified as mineral, which classification was made final by statute unless attacked for fraud. How then could the land be selected as *non-mineral* as required by the Act of March 2, 1899? We are answered, not by the statement that this classification was attacked for fraud and the approval of the Secretary set aside, but that when the land was surveyed the Surveyor having said *nothing whatever about whether the land was mineral or non-mineral,* but only stating that it was heavily timbered, covered with undergrowth and valuable for grazing, that this had the legal effect, not only of setting aside an *approval which was made final by statute* that the land was mineral, but that it amounted to a "classification" as *non-mineral,* which alone made any land subject to selection under the terms of the Act. Certainly both these positions are untenable and cannot be sustained.

What does the phrase: "non-mineral public land *so classified as non-mineral* at the time of actual Government survey, which has been or shall be made" require? Does it require an affirmative classification as non-mineral, or a negative one; a positive classification or merely an inferential one? The affirmative must be shown. Fertilizing Co. v. Hyde Park, *supra.*

There can be no mistake about the intention of Congress for no more apt words could have been chosen to designate the only class of public lands which the company would be permitted to select. The language is plain and unambiguous and there is no room for construction. As it is a private grant it is mandatory and must be strictly complied with. It is the measure of the right of the Company to select any land, and as it has been

accepted in its precise terms no other classification can be allowed to take the place of that so particularly described by the terms of the Act. We apprehend all of this will be conceded.

Let us, therefore, take the admitted language of the surveyor and see whether it is such a strict compliance with the requirements of the Act as to make it subject to selection thereunder in the face of the classification by the Board under the Act of 1895.

Judge Dietrich in his opinion stated the question was not free from doubt, but contrary to the rules of construction of private grants, solved the doubt in favor of the Company, instead of the Government. However, he based his construction upon the theory that it was merely modal and incidental. On the contrary, it is *the only limitation* placed on the right of the company to select any unoccupied and unclaimed public land in any State through or into which its road runs. It is a *positive limitation to be fixed at a specified time by a specified officer.* No land not thus classified could be subject to selection whether mineral in fact, or not. The Trial Court held also that "the absence of a classification as 'Mineral' is equivalent to and is to be understood as 'a classification of non-mineral.' " Let us see about this:

The commissioner's decision states:

> "The subdivisional survey of the Twp. was made in 1903, and the Deputy Surveyor who made the survey reported that *the land if cleared would be suitable for grazing, but at present is more valuable for its timber.*" Record p. 65.

Now, it might be either or both of these and still be mineral. Lands valuable for their mineral deposits can be disposed of only through the mining laws. Coleman

v. McKenzie, 28 L. D. 348, citing Mining Co. v. Consdt. Mg. Co. 102 U. S. 167; Deffenback v. Hawk, 115 U. S. 404, and Coal Co. v. U. S. 123, U. S. 327.

No one can doubt that the lands thus described might *be valuable for their mineral deposits.* They had been so classified and the classification approved by the Secretary. To hold this description to be a non-mineral classification, the contrary must be assumed, viz, that lands suitable for grazing when the timber is removed but with the timber standing, is more valuable for the timber, could, *under no circumstances be valuable for its mineral deposits.* This seems to us to be an absurdity.

ACT OF FEBRUARY 26, 1895, A SPECIAL ACT.

The Act of Februay 26, 1895, is also a special Act and the authorities hereinbefore referred to in support of our contention that the Act of Mar. 2 1899, being also a special Act, its provisions must be strictly followed, are applicable also to the former Act.

The Department in the case of N. P. Ry. Co. 40 L. D. 64, in constructing the Act of March 2, 1899, held:

> "It is true that the land selected by the company may not in fact be mineral but under the terms of the Act which authorizes the company to select lands in satisfaction of those relinquished by it, it is not believed that the Department can inquire into the question as to whether or not the lands are mineral where they are not classified as non-mineral by the return of the surveyor." ***

The Department quoting the decision of the Circuit Court of Appeals of the Ninth Circuit as authority in the case of Northern Pacific Ry. Co. et al., v. United States 176 Fed. Rep. 706, further states that:

> "Congress has thus established a rule of evidence by which the Department must be controled." If the lands are classified as mineral they are not subject to selection by the company, while, if classified as non-mineral, while subject to selection the Government must still inquire into their actual character."

"Classification" has a well understood meaning in land laws and practice, the Geological Survey having been organized for the purpose of classifying the public lands, particularly as to their mineral or saline character. It is the usual practice now for that Bureau to classify lands and wherever there is any doubt, the matter is submitted to the survey for examination and report. Surveyors are not usually instructed to *classify* land. Their instructions go almost if not quite wholly to the question as to whether the lands are heavily timbered, covered with undergrowth or mountainous with a view to fixing the compensation of the surveyor, as a different rate is fixed for these classes of lands. In the case at bar this, and this only, was done by the surveyor at the time of actual survey. Not one word can be found in his returns as to whether there is mineral or not and certainly he did not attempt a classification. But even if it be conceded that for the ordinary purposes of the disposal of the public lands where no question is raised, the absence of any mention of mineral might be sufficient to justify the Land Department in disposing of the land as agricultural land; yet, in an Act which we have seen upon two separate and distinct grounds must be strictly construed against the company and in favor of the grantor, and where the land had been classified as mineral under a statute which also requires the same construction, which classification had been approved by the Secretary of the Interior prior to the date of selection, it would seem to us but little less than absurd to say

that in view of these facts and circumstances the failure of the surveyor to say anything whatever upon the subject of mineral or non-mineral would be a compliance with the law and make the land subject to selection by the company.

We come now to the consideration of our third proposition, viz, that a description in the terms of a future survey is not only a failure to describe the land "with reasonable certainty," as required by the Act, but is no dsecription at all and is therefore absolutely void foi any purpose.

THIRD.

THE ATTEMPTED DESCRIPTION OF THE LAND GIVEN IN THE SELECTION IS VOID FOR UNCERTAINTY.

We are not disposed to quarrel with the Circuit Court of Appeals in its adoption of the Century Dictionary's definition of the term "designate". . . As quoted it is as follows:

> "To mark out or indicate visible lines, marks, description, name, or something known and determinate."

Unfortunately for the argument of the learned Court, none of the definitions given are applicable to the case under consideration.

It will not be contended that a description in the terms of a future survey is "to mark out or indicate by visible lines, nor by marks, nor description. If it falls under any definition given at all, it must be under the last and least preferred definition, viz: "name, or something known and determinate."

Was there any section *20* or even any township 44 N. R. 3 East, *known* at the date of selection? There was not and there might never have been any such section. It was, therefore, *not "known"* and of course was "not determinate."

There are only two possible descriptions of land, viz, one by marking on the ground or by reference to natural objects, which is a *description in fact*, and the other a *description in law*. In the last analysis there is only one, as a description in law presupposes and is based upon a marking on the ground. That is, a *legal survey*. In public lands it is a description in law *only* after the approval of the survey by the Commissioner. Anything else is no description and no designation. F. A. Hyde et al., 40 L. D. 284, citing U. S. v. Montana Lumber Co. 196 U. S. 573.

Until the approval of the survey by the Commissioner there is *no survey* as surveys in the field are often amended, materially changed to comply with the recommendation of the Examiner of Surveys in the field, and not infrequently they are entirely rejected, and new surveys made marking the lines differently from the former survey. It follows, as hereinbefore stated that, until the approval of the survey of this township, there was no such thing as Section 20 known or knowable.

The Court in the case at bar first applied this definition to a tract lying adjoining a subdivision already surveyed, then moved step by step further to the point

where it is stated Section 20, the tract designated to be selected by the company. "is situated three miles south of Section 32, in Twp. 45, a surveyed township and could be readily located from such survey although in a rough country."

We beg to state here and now that the Court is mistaken in both propositions. It is neither three miles south of the Twp. mentioned nor is it due south of Section 32 as stated, which we will demonstrate hereafter. It is conceded by the Court that such a description of itself is not sufficient and is no compliance with the law, but that relying upon the maxim "that is certain which can be made certain," the argument is made that the description might be made certain by measurement from the Ninth standard parallel which is the South boundary of the township immediately north, a proposition which is contrary to the statute and the Manual of Surveying, as this line has nothing whatever to do with the survey of the township south and if relied upon would make all measurements erroneous.

The Act of Feb. 11, 1805, which has controlled the public land surveys for more than a hundred and ten years provides as follows:

> "The boundary lines actually run and marked * * * * shall be established as the proper boundary lines of the section or subdivision for which they were intended; and the length of such lines as returned * * * * by the surveyors * * * * shall be held and considered as the true length thereof."

Moreover, the Act of 1805, and the Manuel of Surveying requires that in all cases, except where there are special instructions, surveys must be made from the S.E.

corner, north and West throwing the fractions on the north and west sides of the township. In the West case special instructions directed the Surveyor to commence at the S. W. corner which had been established and instead of throwing the fractions on the north and west as found by measurement from the south and east, they were calculated and added on the north and west. It is perfectly clear that no one except an expert familiar with the system of surveying could have made these convergencies and certainly no one could have known until the special instructions were approved how the survey of the township would be made.

Will anyone contend that until the survey is made and approved, there is in existence any section of any particular unsurveyed township? We apprehend not. The township may never be surveyed, or if surveyed in the future, it may be fractional, as the location and survey of quartz mining claims or elimination of lands for forestry or other purposes might so change the survey of the remaining land as that there would never be any section 20 in existence. Such a designation amounts simply to the statement that the Railway Company expects in the future to assert title to some unknown tract of land which may be at some time designated by survey as Section 20 of a particular Twp. and Range. Such a designation was not inaptly described by First Ass't Secretary Jones in 42, L. D. 259, as an "*expected or hypothetical description.*" It is not a designation of a known quantity and does not purport to be a description of land at all. And when it is considered that it is not a question between the Railway Company and the Government only, but unless it can be held that Congress intended by the enactment of the Act of March 2, 1899, to place all intending settlers from that date, to some indefinite future date when the survey might possibly be made, at the mercy of the Railway Company, and to

require each and every settler to employ an expert surveyor who could not possibly under any circumstance determine the exact location of the selection by the Railway Company by this unknown and non-existent number, to settle at his peril, this contention cannot be sustained.

The statute requires that:

> "In case such tract as originally selected and described in the list filed in the local land office, shall not precisely conform with the lines of the official survey, the said company shall be permitted to describe such tract anew, so as to secure such conformity.

To our minds, aside from the description of the class of lands which may be taken under the Act, this is the most important part of the statute and proves conclusively that a metes and bounds or natural object survey was intended by Congress in the enactment of the law. If not, why require this new list? A homestead settler is simply required to adjust his lines to the lines of survey. Moreover, how could there possibly be a lack of conformity when no land is described and no lines marked which could require conforming? If a metes and bounds or natural object description was given, based, it might be, upon a private survey by an expert, there would be in many, in fact most instances, lack of conformity; but there could be none where the only description was the particular land which the surveyor might find corresponded on the ground with this number, which was not in existence and could not be until the survey was made and approved. It seems to us that if the statute had said in so many words that the company, if it chose to select unsurveyed land, which it was not required to do, it should make a metes and bounds or

natural object survey as all parties have been required to do for many years, the requirement would have been no more convincing that such was intended, than this requirement of a new list and a conformity with tracts selected and described in the list originally filed.

It is conceded by the Department and by both the Trial Court and the Circuit Court of Appeals that such a description is not certain within itself, but as stated by the Circuit Court of Appeals, "that is certain which can be made certain." But is this rule applicable to this statute, and if it is, do the facts bring it within the rule? In Broom's Legal Maxims, under this head, in a note, it is said: "If a King's grant refers to another thing that is certain, it is sufficient:" 7 Ed. pp. 624 and 625. The Court also states (Record p. 109).

> "It may be conceded in so far as it respects this case, that a description of a section or a quarter section by legal subdivisions in the fastness of the cascades or Rocky Mountain Ranges far distant from any Government survey, or even generally that a description in terms of future survey, is not such a description as is contemplated by the statute. * * * * * Everyone is presumed to know the methods by which the Government surveys are made, and what is meant by township and range and what by section and quarter section, or other legal subdivisions and the relation of one township to another and of one section with its subdivisions to another."

In the first place we may be permitted to ask whether under a statute which requires strict construction and the procedure provided in the statute must be strictly followed and which requires the company in the selection of unsurveyed land to "describe such tract in such

manner as to designate the same with a reasonable degree of certainty," falls within the class mentioned by the Court where resort must be had to extraneous facts and surrounding circumstances in order to give it any degree of certainty whatever? Does not this statute require the selector to designate the land in such manner as that reliance would not have to be placed upon any outside circumstances to make it a description of any kind?

It is an easy matter for the Department or the Courts to say that in a mountainous heavily timbered country as stated by the Circuit Court of Appeals, a tract of land in the interior of a township could be readily located at a distance of three miles, but it is notorious that no two surveyors however competent could make precisely the same measurement over three miles of such ground. The Court in support of its view quotes the testimony of Olaf Edin, a witness for the plaintiff, to the effect that he helped run the exterior lines of the plaintiff's claim stating: "We undertook to tie them up to the Government lines which had already been run as near as we could." But the learned Court failed to mention the further statement of Edin that the line he blazed around the cabin varied from the survey about a quarter of a mile, or nearly a quarter one way and the other way a few rods. (Record p. 341).

The records of the survey of this township will show that if even an expert surveyor had undertaken to locate Section 20 as three miles due south of Section 32 in the Twp. 3 N. he would have located it on a part of the S. E. ¼ of Sec. 21 as there is a jog of 16.90 chains between the S. E. corner of Section 32 and the closing of the line between Sections 21 and 22 on the 9th standard parallel. He would also have located it or at least a portion of it in Sec. 29 as the distance from the South line of the Twp. mentioned to Section 20 is less than 3 miles and a meas-

urement of three miles would have thus located it. (See Letter of the Asst. Commissioner of the Land Office dated March 31, 1916, with diagram marked Appendix A. Also copy of Township plat marked Appendix "B" and by reference made part hereof).

It would hardly be contended that any but an expert surveyor could, even if he knew how the Government survey was to be made, locate with any degree of accuracy over this mountainous timbered country a tract of land in the neighborhood of three miles from a surveyed line *which had nothing whatever to do with the subdivisional survey of the township.*

The Courts have held that a description intelligible only to an expert is not sufficient in a replevin suit. N. Y. Appl. Div. in Thorne v. Lazarus Vol. 39, p. 508, 57 N. Y., Suppl. 279, and in Van Dyke v. N. Y. State Banking Company, 18 Misc. (N. Y.), 661, 43 N. Y. Suppl. 735. See also Board of Education v. Crawford, West Va., 790, quoting approvingly Gorman v. Stead First West Va. 14.

Under the statute and the Manual of Surveying, subdivisional surveys are made from the East and South throwing the divergencies on the north and west as was done in this case. From the letter of the Commissioner (Appendix "A") it will be seen that the survey was not commenced from the South boundary of the Twp. immediately north, which is the ninth standard parallel as it would have been contrary to Departmental regulations and the Surveyors instructions, but in point of fact it was initiated at the corner of Twp. 43 and 44 North, ranges 2 and 3 east which had been established in 1901. The fact that the survey was initiated from this corner is unusual and was controlled by special instructions which no one could have known would be

the case until the approval of such instructions. Ordinarily it would have been initiated from the 8th standard parallel and a line run to the S. E. corner of the township from which the survey would have been made and actual measurements made throwing the discrepancies by actual measurements on the North and West sides of the township instead of allowing for the meridianal convergency from the S. W. corner of the township where the survey was commenced, all of which shows how uncertain any attempted measurements with a view to the actual location of any tract would be found.

All of this argument, however, is based upon the position taken by the Department and the Trial Court as well as the Court of Appeals that the designation of Sec. 20, which did not exist, and was a figment of the brain only at the time of the selection, could have been made certain by a settler by measurements on the ground. If we are right in our position that construing the Act strictly, the company was required by its terms to designate the tract with reasonable certainty and that the statute means precisely what it says, it is immaterial.

In the Hyde case, 40 L. D. 284, construing the Act of June 4, 1897, the Forest Lieu Selection Act, which Act was a general statute and did not require the same particularity of description of unsurveyed lands as the Act under consideration, held:

> "Where the lands applied for are unsurveyed until approval of the township plat of survey, are not identified unless they are identified in fact."

It was further held:

> "An identification in terms of a future survey previous to that time was not possible, either by the unofficial protraction of the lines of subsisting public surveys, or by a private survey of any character—citing U. S. v. Montana Lumber Company 196 U. S. 573 and cases therein cited."

VI.

DECISIONS OF THE COURTS.

That case cited approvingly the case of Central Pacific Railroad Company v. Nevada—162 U. S. 512, wherein Mr. Justice Brown speaking for the Court used the following language:

> "The lands granted to the railroad company were the odd numbered sections within the limits of 20 miles on each side of the railroad, except such as had been sold or otherwise disposed of by the United States or to which a homestead or preemption claim had attached, or mineral lands.
>
> "Until the surveys were made it cannot be known what part of the lands are within the enumerated exceptions, or what sections or parts of sections will belong to the company, nor until then can the locality of the lands be determined so that a description may identify them.
>
> "It must be borne in mind that the unsurveyed lands are not described by metes and bounds or by common designation or name but as sections and parts of sections, and, as alleged by the complaint as their designation will appear when the surveys of the United States are extended over them. It is plain that this is not a description by which the identity of the land can be establish-

ed, and is equally plain that possession of the lands cannot be established until the surveys are made."

In a suit by the Bird Timber Company v. Snohomish County, et al., to cancel taxes levied against the company for the years 1912 and prior years, the Supreme Court of the State of Washington (81 Wash. 416-143 Pac. 433), in a selection under the Act of June 4, 1897, held as follows:

"In the first place, we think the description of the property contained in the selection (in the terms of a future survey) is insufficient to designate any specific tract of property. At the time the selections were made there were not, nor is there now, any specific tract of land marked on the ground which can be located by the descriptions contained in the selections. It may be that in course of time the Government will survey certain lands, and denote them in the surveys in accordance with the descriptions in the selections contained in the Hayes selections; but it is reasonably certain it will not designate any tract in accordance with the description contained in the Goldberg selection.

"This tract, if the present system of surveys is pursued, will border on a township line, and will in all probability be fractional in quantity, in which case it will be designated in fact by lots numbered instead of the general description contained in the selection.

But be this as it may, *there is no means of ascertaining prior to the actual Government survey, what specific tracts of land will be included in the description.*

> It is true that the Act first recited (1897) allowed lieu selections to be made of unsurveyed public land. *But, to be effective as to particular tracts, they must have been made by metes and bounds with a description having the beginning point at some natural or artificial monument, which could be readily and definitely located on the ground.*"

The Court cited and quoted from the case of F. A. Hyde, 40 L. D. 254.

While these decisions are not based upon the Act of March 2, 1899, it seems to us they decide the principle involved in the position taken by the Department, the Trial Court and the Appellate Court as to the sufficiency of such a description under that Act. If, for the purposes of protection against an action for trespass for cutting timber, the Northern Pacific Railroad Company could not by surveys made by experts so locate an odd numbered section to which it was entitled under its grant by a private survey; or that under the Nevada statute such a section could not be so located prior to Government survey as to charge the company with being in possession for the purposes of taxation, we beg to ask how it would be possible for the company in the case at bar by such a description to protect itself against settlers prior to survey, or how settlers could be held to a more drastic system of making certain that which was uncertain for the purpose of protecting their homes, improvements and the years of residence required, than was possible for the State of Nevada and the Central Pacific Railroad Company with their vast resources to do by private survey made for the purpose of locating the lands to which they were entitled. None of these statutes and causes required stricter construction than does the Act of 1899.

VI.

THE DEPARTMENTAL DECISIONS.

The decisions of the Interior Department under the various administrations of that office have been so different, so uncertain and their various statement of facts so unreliable that it would seem this court would not be justified in taking any of them, as the trial Court and the Appellate Court seems to have done generally, without careful inquiry in order to ascertain the real situation. We make this assertion with the full understanding of what it means. It was but natural for the Courts to consider that a great Department of the Government having special charge of a subject in a matter of as much importance as the construction of this act involving nearly a half million acres of land, would be accurate in its statements particularly in its published decisions.

To illustrate our proposition we beg to state that the case of Hanson v. N. P. Ry. Co. was decided March 16, 1910, (38 L. D. 491). In that case the motion forreview was entertained June 9, 1909 and in the decision the Department stated:

> "At the time this motion was entertained this Department had grave doubts as to the sufficiency of such description (in terms of future survey) as against the claim of a settler subsequently initiated, and there was under contemplation then

> the formulation of regulations which would give more precision to such selection and afford settlers greater security in the matter of initiation of claims for such lands. Since that time that subject has been carefully considered by the Department and regulations have been issued which will give such precision and afford such security. Circular of Nov. 3, 1909, 38 L. D. 287."

Notwithstanding this published decision the Department in the decision of the case of Daniels v. N. P. Ry. Co., 43rd L. D. 381, decided by First Asst. Secretary Jones, August 3, 1914, more than four years after the decision of the Hanson case, stated (at page 384) the following:

> "The practice of describing unsurveyed land in in terms of a future survey thereof as being in existence for many years, and *was never challenged prior to the* decision of Hyde and others 40 L. D. 284."

The Hyde case was decided October 6, 1911, more than two years after the statement hereinbefore quoted from the Hanson case. This was a misstatement of fact which the Department had the opportunity to correct upon the motion for rehearing, but which it saw proper to entirely ignore.

The Circuit Court of Appeals quoted this statement at page 108 of the Record.

We have already seen the statement that the Government had determined to create this park and made the offer to the Railroad Company to induce it to convey the land, which was also followed by both the Trial Court and the Appellate Court, is not borne out by the records of Congress.

It was also stated in the Daniels case, that the Hyde case, supra, held as follows:

"Even in the Hyde case, cited and relied upon by the Appellant, it was unequivocally held such description was valid against the Government," when exactly the contrary was held and it was distinctly stated that the first *identification* of the land was when the survey was approved.

Opportunity was given the Department to correct this error, but it also was ignored. We set out in our brief liberal extracts from the letter of First Asst. Secretary Adams dated January 16, 1912, in answer to a letter of the then Commissioner of the General Land Office, who was evidently greatly perturbed over this decision which required a more definite description of unsurveyed land, for he pursued the most unusual course of writing the Department a long argument against the position taken in the decision, deploring its awful consequences in protecting the rights of settlers, and urging its recall or modification. This produced a temparate but most able and convincing answer to the argument of the Commissioner.

After stating what it did not say, the Secretary says:

> "It was, however, among other things, held therein that such a selection does not identify the lands in fact or in law; that pretended proofs of the non-occupancy and non-mineral character of lands not so identified are valueless; and that until identified in fact by appropriate marking upon the ground, or in law by the approval of the township plat of survey, lands so selected are subject to settlement by any qualified homesteader under the Act of May 14, 1880."

> "Prior to the adoption of the regulations of Nov. 3, 1909, (38 L. D. 287); *no general instruction* as to the selection of unsurveyed lands appear to have issued, but that prior to that time *special*

instructions were issued in the administration of a number of acts, etc., etc."

There can be no mistake as to what Mr. Adams understood this decision to mean, and what he did hold. With this understanding of what said decision held, he took up and considered the suggestions made by the Commissioner. In connection therewith he stated:

> "Passing from the field of administration based upon these statutory provisions, you further call attention to numerous proclamations issued by various Presidents of the United States covering a long period of time, and also refer to the case of Hanson et al v. N. P. Ry. Co., 38 L. D. 491, and certain unreported decisions, etc."

He then takes up the various matters urged by the Commissioner and states:

> "No good administrative purpose would be served by extended historical statements or analytical discussion of the many-sided allied propositions arising either directly or indirectly upon your statement of the matter. I must confine myself, for the present, to a few general observations upon the broad question presented and leave the details to consideration in due course of administration, I may say, preliminarily, that said decision of Oct. 6, 1911, was only reached after the most diligent study of the subject of selections of unsurveyed lands under the various Acts of Congress which permits such selections, and with a profound sense of its importance. I was not unaware that the conclusions therein reached were in some respect seemingly at variance with the views entertained, and the precedents established by preceding administrations. I was, however, and am still impressed with the thought

that such suggested variance is more seeming than real, at any rate, that the change is less comprehensive than your communication assumes." * * * * * * * *

He further stated:

"The fact that the Executive, in issuing proclamations withdrawing public land, has resorted to the method of description condemned in said decision of Oct. 6, 1911, furnishes no argument either as to the soundness of such method or basis of argument for its extension to locations or selections by individuals. A withdrawal on behalf of the Government has no analogy whatever to the case of a location or selection by a person in his own interest."

Referring to the Hanson case, it is said:

"The text of that decision does not show whether or not Hanson settled before survey, and for this and other reasons I do not at this time care to express an opinion as to the soundness of said decision." * * * * *

"In conclusion I have to say that in the study of the various acts of Congress, above mentioned, I was profoundly impressed with the thought that while they permitted and authoried the initiation of claims to unsurveyed lands, they all evidently contemplated that such lands should be identified in some appropriate and effective way. There is nothing in any of these Acts justifying another conclusion. If, in the administration of these laws, it has been assumed that identification would be accomplished by such description as is now contended for on the ground of precedent, such assumption was unwarranted.

> "To describe a tract of land as what will be, when surveyed, a certain parcel of the public domain is certainly indefinite. It means nothing except that in such case the selector thereby expects to initiate a preference claim to land somewhere without giving notice to other persons who may wish to make an appropriation under the same or other laws, and who, after he has gone upon the public domain, in pursuance of such lawful design and marked his claim, and perhaps cultivated and improved it, may be awakened years thereafter to find that it is lost to him by reason of a prior appropriation of which he had no notice either in law or in fact. The proposition, therefore seems to lead to a preposterous result, and in my opinion, cannot be entertained."

These statements leave no doubt whatever as to what Secretary Adams intended to decide in the Hyde case. It also furnishes a stronger argument than we could possibly make in support of our contention that such a description is utterly and absolutely void for any purpose. But, if for any purpose, this decision holds that it is no protection against settlers who settled before survey.

This was the clearly defined position of the Department in the matter of Forest Lieu Selections of unsurveyed land, requiring a metes and bounds or natural object description when the Northern Pacific Railway Co. applied to First Asst. Secretary Jones for, and obtained an oral hearing on the petition of Kip Calkins Miles and a number of other Homestead settlers, filed in 1911, asking the Secretary to exercise his supervisory authority and reverse decision against them and in favor of the Railway Company based on its selections of unsurveyed land in terms of a future survey. The hear-

ing was had and as the case of Mrs. Miles was the only one in which a hearing before the local officers had taken place and the record of the hearing was in the Department, and she was present offering to testify as to her lack of either notice, or actual knowledge, after most diligent inquiry, of the Railway selection, the arguments were addressed to her case and that of her associates in said petition. The Department for some reason unknown to us, took up the Daniels case, which was an application to contest, not mentioned at the oral hearing, in which the nearest surveyed line was one mile while the nearest point from which a survey could have been legally made in the case of Mrs. Miles was 12 miles. The case is reported in 43rd L. D. 381 and is made the leading case and the Miles case was ruled by it. Her motion for rehearing was denied and the Department declined to state the facts, and the land was patented to the Company while it was pending undecided in the Department. The case of F. A. Hyde, supra, and all other cases in conflict were overruled. This case is cited by the Circuit Court of Appeals as being an affirmance of the Hanson case and overruling of the Hyde case.

The Daniels case admitted that a metes and bounds or natural object description should have been always required, as it then was (and for many years had been), yet held that:

> "If a selection of a specific tract, identified by reference to a survey, be filed in the local office, the Register and Receiver are enabled to note the claim in its appropriate place."

This is an absolute impossibility and it was well known that it has not been and cannot be done with such accuracy as to even approximate the locality. However the gist of the Daniels case, omitting the many

pages of an attempt at defense of what was admitted to have been a bad practice and should never have been permitted and of the citation of numerous circulars not one of which was based upon a statute requiring a struct construction, but all of a general character or remedial acts requiring a liberal construction, laid down the following rule:

> "If, therefore, at the date of the selection any line of the public survey had been established in the vicinity of the selected land, it is not believed that a selection like the one under consideration lacks in fact, any element of reasonable certainty."

The District Court in the West case, quoted as authority in the Daniels case held, that such public survey must have been in the "immediate vicinity," the definititon of which is equivalent to *adjoining.*

The learned court of Appeals in the West case held as follows:

> "A description by legal subdivisions is a perfectly intelligible designation of a tract of land, so it must follow that a description which will be a legal subdivision when surveyed, if lying "*adjoining*" a subdivision already surveyed, is also a perfectly intelligible description."

It is true the Circuit Court of Appeals followed this by saying that to move a step further and up three miles, in that case, could be located by measurement.

It thus appears that the effect of the decisions of the District Court and of the appellate Court is that a perfectly intelligible definition of a tract of land when

unsurveyed is one lying adjoining a line or subdivision already surveyed, while the Department in the Daniels case stretched this definition to the "vicinity" of a surveyed line, from which it must follow that when leaving an adjoining line the domain of uncertainty is reached, requiring the services of an expert, which as we have seen the Courts hold cannot be required to make that certain which is uncertain, besides, it cannot be done even by an expert.

How would a sheriff or Marshall execute a decree requiring him to put John Doe in possessession of a tract of land described in terms of a future survey, especially when not adjoining any line of established survey? He would undoubtedly have to employ the services of an expert surveyor and then he could not know whether he was placing the party in possession of the right land or not.

Going back now to the terms of the Act. of Mar. 2, 1899, requiring the filing of a new list within 90 days after the filing of the plats of survey in the local office, which the Department held in the case of N. P. Ry. Co. v. Pyle 31 L. D. 396, was absolutely essential to protect the rights of the company against settlers.

Although the Daniels case like the one bar was not an ex-parte case, yet the Department dwelt long and eloquently upon the existence for many years of the practice of describing unsurveyed land in the terms of a future survey, quoting the Hanson case (38 L. D. 491). At the oral hearing we challenged counsel for the Railway Company and requested First Assistant Secretary Jones and those sitting with him, including the Commissioner of the Land Office, to point to any decision sustaining such practice. Their utter failure to do so, demonstrated at least to our mind, that there

was no such practice. And, even if there had been such a shadowey uncertain, loose, slovenly practice allowed in ex parte cases, it furnished no reason whatever why it should be allowed against settlers with unusual equities so far as residence and the endurance of hardships were concerned, in conflict with a private grant.

But in point of fact the practice, so far as it can be said any existed, was exactly the contrary. The Northern Pacific Railroad Company succeeded in getting Congress to pass the Act of Feb. 26, 1895, for the classification of lands within the limits of its grant in certain districts in Idaho and Montana, embracing the land in the case at bar.

April 13, 1895 (20 L. D. 350) ~~Senator~~ Secty Hoke Smith promulgated a circular of that date for the execution of the provisions of the Act. At page 353, after instructions as to surveyed lands the Commissioners were directed to examine and classify all unsurveyed lands, "*observing the difference* that the lands *must necessarily* be described by *natural objects and permanent monuments to identify the same, etc.*"

It may be said, as it was as to the circular Feb. 14, 1899, *supra, that it was issued before the date of the* Act of 1899 and is not applicable, although it applied to the particular land in controversy. If so, we desire to call attention to the fact that the company procured an extension of this Act June 25, 1910 and that under its provisions a circular was issued jointly by the Land Office, the Geological Survey and the Interior Department for carrying into effect this extension dated July 26, 1910, (39 L. D. 116) wherein at page 119, *the same language is used as to the description of unsurveyed land by metes and bounds or by natural object, as that above quoted in the Circular*

of April 13, 1895. If follows that the *practice* from April 13, 1895, at least to July 26, 1910, as it affected this particular *tract* and all other lands which were unsurveyed within the provisions of Acts of 1895 and 1910, *absolutely required a metes and bounds or natural objects description by the Commission.* Tis strange indeed the Department was unable to find these circulars.

In the case of the Northern Pacific Railway Company v. Amacker, 175 U. S. 564, this Court, Mr. Justice Brewer, speaking for the Court, said:

> "The contest in this case it between one claiming under a homestead entry and the company claiming under a grant in aid of the railroad. It was long ago said by this Court that 'the policy of the federal Government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements over that of any other person' ***
>
> "There is no real hardship in enforcing this rule, for, if the individual seeking to maintain his homestead entry fails by reason of any defect he has no recourse on the Government for the fees he has paid or for any compensation for the time and labor he has expended, while, on the other hand, the general provision of the Railroad land grant is to the effect that if the title to any tract within the place limits fails the company may reimburse itself by a selection within indemnity limits. It is not, therefore, strange that the rulings of the Land Department, as well as of the Courts, have been uniformly favorable to the individual contesting with a railroad company the right to a particular tract of land."

This doctrine applies with peculiar force under the grant in this case which gave the Railroad Company a roving commission to select not only from a limited area embraced in indemnity limits, but any place within the States of Wisconsin, Michigan, North Dakota, Minnesota, Montana, Idaho, Oregon and Washington. It is also true that if the selection by the Company failed it can make another selection and "reimburse itself."

Let us see, however, how this beneficient doctrine, so often expressed by this Court, and on occasion by the Interior Department, is carried out by that Department in its decision between Railroad companies and settlers.

In the Hyde case, *supra*, and a subsequent letter of First Asst. Secretary Adams, we had reasoning based upon the just rights of both parties.

In the Daniels case, supra, although the Hyde case was overruled, this reasoning was unanswered. *It is unanswerable because it is just, exquitable and right.* The Department, in favor of the Railroad Company and against the settler, based its decision upon what is admitted was a bad practice and should never have been allowed, and applied circulars under other acts of a general or remedial character, and this too, not in an *ex parte* case but against the settler, forfeiting to the company all his improvements, the result of years of labor and privation. This was done while admitting this imaginary practice was wrong and had been long since abandoned. There was not even the argument advanced that because of this practice allowed by the Department the Railroad company had been led to make the selections as it did and thereby would sustain great loss unless this bad practice, not sanctioned by any Circular, but admittedly wrongfully allowed was sustained; but on the contrary the scrip used could be used on other lands,

or if put on the market would be more valuable than when it was originally filed. In other words, the company would sustain no losses, had no equities whatever, never having expended a dollar, if the decision had followed the humane, just and equitable decision announced by the Court above quoted from, and substantially followed in the Hyde case, which instead was overruled.

This is not all, in the construction of this Act by the Department, the company has fallen upon pleasant lines, and it is not strange that it did not insist upon any Circular of instructions so long as it could get all it asked for under construction of statutes passed for the benefit of settlers and which were entitled to liberal construction. To illustrate: The Department in the Hanson case, upon the authority of which the West case was decided (38 L. D. 491) declined to make the Circular of Nov. 3, 1909, retroactive on the ground that it was not in existence at the time of the location and it would therefore be unfair to apply it, although clearly in the interest of a better practice and the protection of settlers.

We thus have one decision holding a Circular issued before the date of the Act is not applicable for that reason, and the other that a later circular was not applicable because issued after the date of the Act, although made retroactive by its specific terms. It would seem to follow therefore, that in the view of the Department any Circular which tended to restrict the matter of selection of unsurveyed lands could not apply to the Railway Company under this Act, unless issued on the day of its date, and yet in the Daniels case a Circular under the Act of June 4, 1897, known as the Forest Lieu Act, dated May 9, 1899, (28 L. D. 521), after the date of the Act of March 2, 1899, is thus referred to and relied upon:

> "Indeed, in the instructions of May 9, 1899, (28 L. D. 521), under the Act of June 4, 1897, supra, was incorporated a provision broad enough

> to cover all selections of unsurveyed land under any Act of Congress in which the only requirement as to description was that the land should be designated according to the description by which it would be known when surveyed, if that be practicable. This rule was applied by the Land Department to all unsurveyed lands until the adoption of the regulations of Nov. 3, 1909."

As we have heretofore seen, the Act of June 4, 1897, was a general statute and entitled to liberal construction as contradistinguished from a private Act such as that of March 2, 1899.

In an opinion submitted by Assistant Attorney General, now Mr. Justice, Van Deventer, to the Secty. of the Interior (28 L. D. 312), the following quotation from the decision of the Department in the case of F. A. Hyde and Joseph William Belden (28 L. D. 284), was quoted approvingly:

> "By the establishment of these reservations many claimants and owners of land within the reservation boundaries were placed in a state of greater or less isolation from market and business centers, and from church, school, and social advantages, and the value of their property for residence and other purposes was thereby impaired. The withdrawal from settlement and other disposition of the surrounding public land precluded such persons from obtaining the advantages consequent upon the continuing and increasing settlement which was anticipated when their claims were initiated or their title acquired. In consequence they were clamorous for relief from Congress. Strenous efforts were made to have

the more recent reservations revoked *in toto.* Instead, Congress granted the measure of relief contained in the Act of 1897."

The history of this Act therefore is very different from that of March 2, 1899, as we have already seen. In the latter case there was certainly no clamor from the settlers on the land for the Act, and if there had been, and they had expected a fair deal they would have been disappointed, for the Act discriminates against them and permits them to select *only* surveyed land in lieu of their holdings, while the Railroad Company is permitted to select *unsurveyed,* as well as surveyed land.

This was followed in the Daniels case, supra, both of which cases were referred to by the Circuit Court of Appeals in support of its decision, notwithstanding the fact that there was theretofore no Circular under the Act of March 2, 1899, and the further fact that this Circular of Mar. 3, 1909 *was made retroactive by its specific terms.* It provides:

> To remedy the confusion and uncertainty arising from applications and selections for and filings and locations upon unsurveyed public lands, you will *hereafter reject* any such application, selection, filing or location, under whatsoever law permitted, unless it conforms to the following rules.

The first rule requires "a description of the land by metes and bounds, with courses, distances, and reference to monuments by which the location of the tract on the ground can be readily and accurately ascertained. The monuments may be of iron, or stone or of substantial posts well planted in the ground, or of trees or of natural objects of a permanent nature, etc., etc."

The second rule required in addition an approximate description by Section, Township and Range.

The third rule requires the claimant within 30 days after notice of filing of plats to adjust the claims to the public surveys, and the fourth rule requires posting in a conspicuous place on the land as described in rule one.

The only reason given for not holding the whole of this Circular to be retroactive, as required by its specific terms, is, as stated in the Hanson case, because:

> "It appeared that the practice of allowing selections by the railway company as these selections were made had been of such long standing and such uniform practice that it would be unfair, if not illegal, to give retroactive effect to such regulations."

Why either unfair or illegal? Certainly no more unfair to the Railway Company than to individual settlers. Moreover, no Circular nor decision showing such practice ever existed was, nor could be, produced. The question had never been raised by contest. Not *"illegal,"* for no one would claim any vested right was acquired by the selection, and there is no rule against making it retroactive in such case.

But, to us, the most amazing thing about the decision in the Daniels case is the following statement:

> "Not only have descriptions of unsurveyed land in terms of a future survey been recognized in Departmental practice, but, as has been stated, *such descriptions are required by the regulations now in force* as an essential part of the description in all applications for unsurveyed land. In-

deed in the instructions of May 9, 1899, (28 L. D. 251), under the Act of June 4, 1897 supra, was incorporated a provision broad enough to cover all selections of unsurveyed land under any Act of Congress in which the only requirement as to descriptions was that the land should be *designated according to the description by which it would be known when surveyed, if that be practicable.*"

In the first place the statute in controversy does not require that the land should be "designated according to the description by which it would be known when surveyed," but on the contrary requires that it shall be designated "with a reasonable degree of certainty," a very different proposition.

Again, the Circular of May 9, 1899, had been distinctly held by the Department (37 L. D. 135), to not be applicable to this Act. In that case it was said:

> "The State seeks to apply the same rule to selections under the Act in question that is applied to selections made under the Act of June 4, 1897, and June 6, 1900. The instructions issued under said acts were not intended to govern selections made under other acts. Comstolk v. N. P. Ry. Co. 34 L. D. 88."

In the Comstolk case cited, the Department referring to the Act of 1899, held the Circular of July 7, 1902, (31 L. D. 372), limiting selections under Act of June 4, 1897, to surveyed land did not apply to it for the reason that:

> "The latter is a special Act which dedicated and set apart a portion of the land in the Pacific Forest Reserve, etc."

But still more astonishing and misleading is the statement that "such descriptions are required by the regulations now in force as an essential part of the description in all applications for unsurveyed land."

What gives this statement the appearance of an apparent effort to mislead is its close connection with the statement that the Circular of May 9, 1899, contains a provision broad enough to cover all selections of unsurveyed land, leaving the impression that the regulations now in force simply follow and approve that method of describing unsurveyed land; when, as we have seen, a most thorough metes and bounds and natural object description, with iron, stone, or wooden posts or trees for marking corners is required by the retroactive regulations of Nov. 3, 1909 (38 L. D. 287), which is followed by this regulation *mentioned* to the effect that *in addition* to this elaborate accurate, description in fact, there shall be also an approximate description by section, township and range. There is no hesitation in marking this part of the regulation retroactive. This could hardly be more misleading. It is thus seen, the Department refuses to make that part of the Circular which requires a description in fact and which would constitute notice and a protection to settlers, retroactive, but undertakes to bolster up the contention that the description in terms of a future survey *alone* is sufficient by referring to this additional requirement, thereby making that part of the Circular retroactive, leaving out the first and essential requirement, as well as the requirement that notice shall be given which is required by the fourth rule to be posted on the land as described—not in terms of future survey—but the metes and bounds description under the first rule. But, even, this crumb of comfort for the Railway Company shows that it was not deemed practicable in all cases to thus describe land. We need not ask why, because both the Trial Court and the Circuit

Court of Appeals have held that only a description adjoining or in the immediate vicinity, (the definition of which is equivalent to adjoining) an established survey, is an intelligible one and hence practicable.

Again, the Department in the Daniels case failed to call attention to the fact that this Cir. of May 9 had been superceded by one dated December 18, 1899, upon the same subject (29 L. D. 391). This Circular distinctly revoked the Circular of May 9, 1899 and substituted the Circular of Dec. 18, 1899 for it. A foot note to the Circular of Dec. 18, 1899, refers to the Circular of June 30, 1897, 24 L. D. 589, to paragraph 14 to 18 inclusive. An examination of paragraph 17 of this Circular is as follows:

> "In case a settler on an unsurveyed tract within a forest reserve desires to make a change of settlement to land outside of the reservation and receive credit for previous residence he should file his applications provided for in paragraph 15, including the affidavit as to residence therein required, and describing his unsurveyed claim with sufficient accuracy to enable the local land office to approximately determine its location."

However, as we think we have demonstrated these Circular under acts requiring liberal construction are not applicable and have been used by the Department only to the extent to which they seem to hold that a selection in terms of a future survey is possible in some cases, but realizing that it is only the exception, they provide for a metes and bounds description where not practicable. And, while quoting from such provisions of a Circular applicable to the Act of 1897, as might tend to support this bad practice, the Department fails and refuses to

apply that part of it which requires notice to be given of selections of unsurveyed lands. See also as to instructions of Dec. 18, 1899 (29 L. D. 391—31 L. D. 251.)

It also ignores the instructions of Secretary Smith to the commission in the classification of this identical land under the Act of 1895.

VII

THE ACT OF JULY 1, 1898.

But the most remarkable theory advanced by the Department in the Daniels case in support of an always bad and long ago abandoned supposed practice of designating unsurveyed land in terms of a future survey is, that referring to the Act of July 1, 1898 as a Congressional approval of this method. It is said:

> "Attention has heretofore been directed to the Act of July 1, 1898, in which Congress required that a selection of unsurveyed land by the Railway Company should be of "odd numbered sections to be identified by the survey when made." It is a fair inference that Congress in passing this law was familiar with the practice of the Department in permitting locations and selections under such description and advisedly ratified and applied that practice to selections under the Act. Had such a description as the one involved in this proceeding left any element of reasonable

certainty, in the judgment of Congress, no such requirement as to the description of selected unsurveyed land would have been placed in the Act of 1898."

It is probably due to our obtuseness of mind that we are totally unable to grasp the force of this position. The provision in the Act of 1898, quoted, confines the railroad company to selections of land in *odd numbered sections*, to be identified by the survey, when made. The force and effect and the only force and effect of this provision is first, as it was a part of the adjustment of the grant giving the odd numbered sections to the Company, Congress confined the Railroad selections in lieu of settlers claims to odd numbered sections. What else does it do? It provides these odd numbered sections must be identified by the survey when made. How else could they be identified and at what other time? We have insisted and still insist that the odd numbered sections could not be identified in any way until the Government survey which view is in harmony with the decision of this Court in U. S. v. Montana Lumber Company, 196 U. S. 573 and cases there cited. Suppose all of the provision except the words limiting the company to odd numbered sections had been left out. Would it have changed the meaning in the slightest? Certainly not. The land would have been designated precisely as prescribed and could be designated in no other way.

The language of the Act of 1899, does not follow this in the remotest degree, but on the contrary provides that the company in making its selection must "designate the land with a reasonable degree of certainty." No language having any such meaning is found in the Act of 1898.

In the case of U. S. v. Burr, 159 U. S., 78, this Court referring to the Tariff Law of 1894, speaking through Mr. Chief Justice Fuller, held:

> "In these circumstances we are entitled to avail ourselves of such light as the history of the steps taken in the enactment of the law, as disclosed by the legislative records, may afford."

The Secretary in the Daniels case adds:

> "The requirement in the Act of 1899 that the land selected be described with a reasonable degree of certainty must be construed in the light of the Act of 1898 which was, in fact, a determination by the law making branch of the Government that a description in terms of a future survey was sufficient and valid."

Again we are at a loss to see what relation there is between a requirement that land shall be designated with a reasonable degree of certainty and that in the Act of 1898 confining the company to odd numbered sections to be designated by the survey when made. In point of fact the language of the Act of 1899 as to unsurveyed land was copied literally from the Act of August 5, 1892, which was a remedial statute held by the Department to have been enacted wholly in the interest of settlers holding patents or entries upon land under the rulings of the Department as to the terminus of the railroad which rulings were overruled by this Court. It is clear therefore that Congress in enacting the Act of March 2, 1899, could not have had in view the Act of 1898.

The legislative history of these two acts is that as hereinbefore set out the bills for the Act of March 2, 1899, in precisely the language in which they finally passed and were approved were introduced in the 54th Congress, passed both Houses and was signed by the Speaker March 3, 1897, but was not approved by the

President. This was more than a year before the Act of 1898 made its first appearance through the Senate Committee on Appropriations as a rider upon an appropriation bill. The absurdity of the position of the Department therefore, must be apparent to everyone. Unfortunately the Circuit Court of Appeals relying upon the unjustifiable statements of the Department in the decision in the Daniels case, referred to this Act of 1898 as having some bearing in the case.

The amazing fact, however, is that the Department was given an opportunity in the motion for rehearing in the Daniels case to correct this, together with other erroneous statements hereinbefore set out, but in its wisdom, saw proper to ignore the urgency of the motion.

If, however, the Department is right in saying in the Daniels case that the Act of July 1, 1898, was a "Congressional indorsement of the method of description in terms of a future survey," why was it that the Department years before this decision characterized the practice as a bad one, which never should have been allowed and which was abandoned years ago and a metes and bounds description required.

We might also ask what right the Department would have to thus designate a description approved by Congress and abandon it as a bad practice? Were it not for the high regard we have for the officials thus holding we would be constrained to say that its absurdity is apparent. As it is, we can only say that zeal has outrun judgment, in our opinion. Moreover,the decision admits not only that it was a bad practice long since abandoned, but that of itself it was not a definite description, but depended upon its proximity to established

lines of Government surveys. In other words, it was not a definite or certain description, but in some rare instances might be made definite if the land was in the "vicinity" of surveyed lines.

CONCLUSION.

In conclusion, we beg to submit that the Northern Pacific Railway Company could not make a valid selection of land under the Act of March 2, 1899, in its own name without the action of Congress which made the grant to the Railroad Company upon terms and conditions which were accepted by that Company, the privileges and valuable rights given by the grant could be exercised by the grantee only.

Second, But, if it should be held that this view is erroneous then we submit that as the land was classified as mineral under the Act of 1895, which classification was approved by the Secretary of the Interior prior to the date of the selection, and which *by the terms of the statute became final* in the absence of protest, except for fraud, could not be selected either by the Railroad Company or anyone on its behalf without first having this approval of the Secretary set aside for fraud, which was not undertaken and is not claimed.

Third, In addition to this no land could be subject to selection under the Act unless it was affirmatively and positively "classified" by the Surveyor at time of actual survey by the Government, as non-mineral, and no failure to state whether the land was mineral or non-mineral could be held, under the strict limitations of the statute to be such classification, and for this reason it was not subject to selection.

Fourth, If we are right in either of these propositions it is unnecessary to consider the lack of a description of the land in terms of "reasonable certainty" required by the Act, for whether the description be sufficient or insufficient, if the land was not subject to selection by the Company its claim must fail. We do not believe that we can express with as much force and accuracy as did First Asst. Secretary Adams in his letter to the Commissioner, supra, the grounds of the insufficiency of the description of lands in terms of a future survey. We therefore at the expense of repetition quote as follows:

> To describe a tract of land as what will be, when surveyed, a certain parcel of the public domain is certainly indefinite. It means nothing except that in such case the selector thereby expects to initiate a preference claim to land somewhere without giving notice to other persons who may wish to make an appropriation under the same or other laws, and who, after he has gone upon the public domain, in pursuance of such lawful design and marked his claim and perhaps cultivated and improved it, may be awakened years thereafter to find that it is lost to him by reason of a prior appropriation of which he had no notice either in law or in fact. The proposition, therefore, seems to lead to a preposterous result, and in my opinion cannot be entertained."

The learned Judge who delivered the opinion of the Circuit Court of Appeals referred to this description required by the statute as follows:

> "An exact description is therefore unimportant, but the applicant must designate the tract designed to be selected with a reasonable degree of certainty. The filing of the first list is

> in a sense preliminary to obtaining the patent. It initiates the right, and not as much particularity and exactness is ordinarily required as to where final stages are to be observed in clearing up and completing the transaction."

We may be permitted to ask what is the purpose of this requirement of a description with reasonable certainty? The Court says it is not the basis for patent. We would infer from the decision that it was only a matter between the selector and the Government and that any kind of a description was sufficient prior to the filing of a new list. Here again we find a complete ignoring of the rights of intending settlers upon this unsurveyed land. It certainly was not the intention of Congress that settlers should settle at their peril at any time before survey and the filing of a new list, which, in many cases, as in the one at bar, was a number of years after the selection and the filing of the new list to which the learned Court refers as conforming to the established surveys which is always precisely the same as that given in the selection list, for the reason that there is *no description* at all of any kind, either of certainty or the contrary until the new list is filed and there is never any *conformity* because none is possible under such a selection and this makes the language of the statute an absurdity, which the Courts never hold. If not for the purpose of being sufficiently definite to give notice to intending settlers of the claim of the company on the ground, then it utterly fails of the purpose intended by Congress and might as well never have been filed. As between the Government and the selector it is wholly unnecessary, for unless to be protected against the acquisition of rights by settlers, there is no possible reason for making selections until the plats of survey are filed. It is impossible to ignore, evade, or get away from the clearly expressed purpose of Congress that

this designation of the land with a reasonable degree of certainty, language required in no other Act, except one wholly for the benefit of settlers, as construed by the Department, means *that it shall constitute notice to intending settlers. They* must give notice of *their* claims in such a way that the Railway Company could not be mistaken as to the lands claimed by them. Are they, or are they not, entitled to the same consideration at the hands of the Railway Company when Congress specifically provides for such a description as would be notice to them. Asst. Secretary Adams, in his letter to the Commissioner, stated that he was "profoundly impressed with the thought that while they permitted and authorized the initiation of claims to unsurveyed lands, they all (Acts of Congress) evidently contemplate that such lands should be identified in some appropriate and effective way. There is nothing in any of these acts justifying another conclusion."

The whole question resolves itself into this proposition: Shall the Railway Company by filing a List in the local office under a description which does not then exist, and may never exist, be permitted to prevent the settlement of the public unsurveyed lands until such time as the Government may determine to survey them and thus prevent the settlement of the country except where the settlers are willing at their peril to guess at where the particular unknown and unknownable number may fall on the ground, when surveyed, if it is ever done; and then risk the forfeiture to the Railway Company, which has not expended a dollar, of the fruits of their labor for many years, and such improvements as they have been able to make. In this case, according to West's testimony (Record p. 29), they are worth $2,800. It may well be said, as stated by First Asst. Secretary Adams, "the proposition seems to lead to a preposterous result." And we might add that it is so fraught with

such injustice and unfair treatment of the pioneer settlers the men who settle, build up, and develop the Country, that no Court whether of law or equity, should tolerate it unless forced to do so by the unambiguous positive requirements of a statute.

Respectfully submitted,

S. M. STOCKSLAGER,

A. H. KENYON,

SEABURY MERRITT,

Attorneys for West.

APPENDIX "A".

Survey of Sec. 20, T. 44 N., R. 3 E., Idaho.

Washington, March 31, 1916.

Stockslager, Heard & Stockslager,

Attys. at Law, McGill Bldg.,

Washington, D. C.

My dear Sirs:

I am in receipt of your letter dated March 23, 1916, in which you request information from the records of this office in reference to the survey of Sec. 20, T. 44 N., R. 3 E., B. M., Idaho.

In reply you are informed that in the survey of this township in 1903, the records of this office show the following conditions:

1. Prior to the survey of T. 44 N., R. 3 E., Sec. 20 could not have been readily located unless allowance was made for the theoretical convergency of the meridians and the location of the corners on the 8th standard parallel, which would govern the corners to the north up to a closing on the 9th standard parallel.

2. In making the survey of this township, the survey was not initiated from any point on any line in T. 45 N.

3. The survey of T. 44 N., R. 3 E., was initiated from the accepted corner Ts. 43 and 44 N., Rs, 2 and 3 E., which was the southwest corner of T. 44 N., R. 3 E., and this corner was therefore the governing corner for the survey of this township according to the provisions of the manual of surveying instructions in such cases, and his instructions in consequence thereof, provided that he should commence at this corner. The township to the south above the 8th standard parallel had not yet been surveyed, and this was the most practical corner under the circumstances from which to initiate the survey of this township.

4. Beginning his survey at such initial point the deputy surveyor first ran the south boundary of T. 44 N., R. 3 E., due east 477.67 chs. the exact theoritical length, allowing for the earth's convergency. The southeast corner of the township was then established, and a line therefrom, run due north setting the corners on the east boundary of the township at regular intervals and at 474.96 chs., a closing corner established at its intersection with the 9th standard parallel on the south boundary of Sec. 32, T. 45 N., R. 3, 16.80 chs. west of the corner of Rs. 3 and 4E., T. 45 N.

The south boundary of Sec. 31 was made 77.67 chs., and the south boundaries of Secs. 32, 33, 34, 35 and 36, were made 80 chs. each according to the instructions and the provisions of the manual in such cases. The survey of the subdivisional section lines were then proceeded with in the regular manner, initiating each line on the section corners on the south boundary, the east tier of sections being first surveyed then proceeding with the survey of the successive tiers to the west. The corners governing the survey of the boundaries of Sec. 20, were the corners of Secs. 32 and 33, and of Secs. 31 and 32,

from which corners the lines were run north 0o 4'w., and north 0° 5'W., respectively 160 chs., where the southeast and southwest corners of Sec. 20 were established.

5. From the initial point the survey of the township proceeded in the regular manner as provided in the manual under such circumstances.

6. T. 44 N., R. 3 E., contains 22693.87 acres according to the survey all sections on the north and west boundaries being fractional, therefore not containing precisely 36 full sections which would be 23040 acres, the deficiency being 346.13 acres.

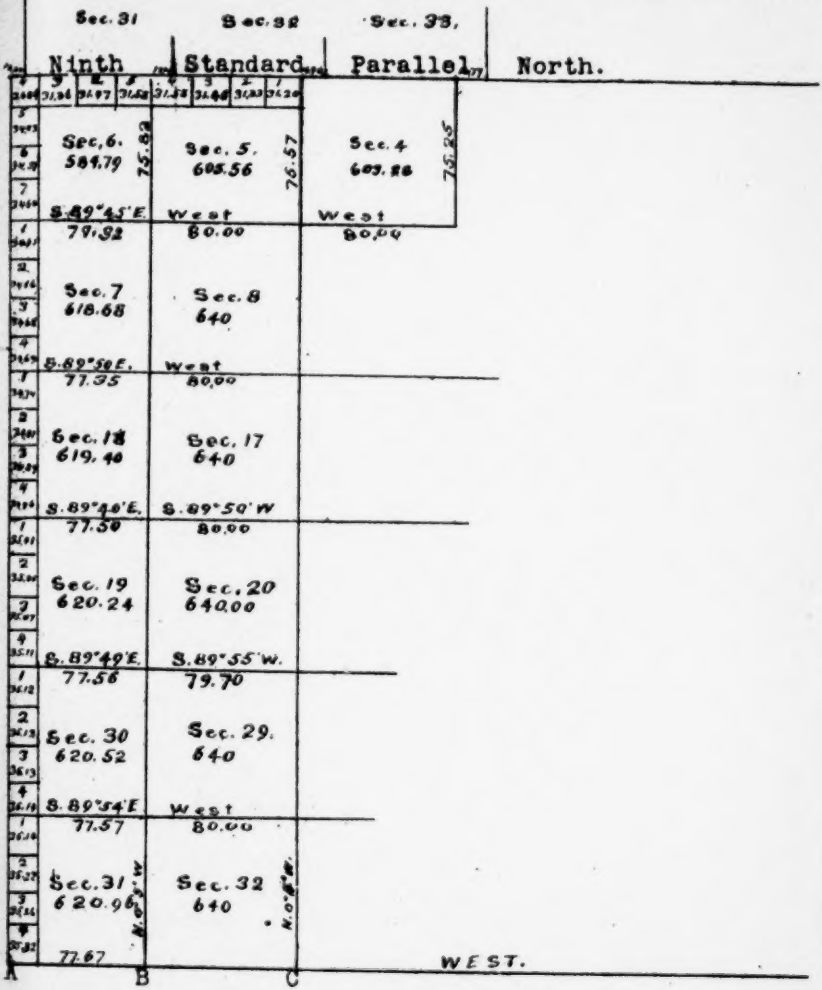
Very respectfully,

C. M. BRUCE,

Assistant Commissioner.

3-28-JSS

DIAGRAM OF A PORTION OF T. 44 N. R 3 E. B. M. IDAHO.



A Corner from which the survey of T. 44 N. R. 3 E. was initated.

C Initial corner from which the lines were run for the location of the corners on the E. bdy. Sec. 20.

B Corner from which the lines were started which govern the location of the corners on the S. W. and N. boundaries of Sec. 20.